91-1058

No. _____

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In The

Supreme Court of the United States

October Term, 1991

BETH ANN GOODWIN,

Cross-Petitioner,

v.

UNITED STATES OF AMERICA,

Cross-Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the self-incrimination clause of the Fifth Amendment prohibits the government from compelling a citizen's testimony under immunity and then later using that testimony in a quasi-criminal action to seize and forfeit that citizen's home.

2. Is the appropriate statute of limitations for a 21 U.S.C. 881 forfeiture action the statute of limitations which purports to govern all civil forfeiture actions, set forth at 28 U.S.C. 2462, or is it the statute of limitations applicable to the customs laws set forth at 19 U.S.C. 1621?

3. Whether the Fourth Amendment and the due process clause of the Fifth Amendment apply to a seizure and forfeiture of a home pursuant to 21 U.S.C. 881 *et seq.* to prevent the government from unreasonably delaying the forfeiture action after notice of the basis for the action.

4. Whether the Fourth Amendment and due process clause of the Fifth Amendment permit the government to seize and forfeit a home from an innocent owner pursuant to 21 U.S.C. 881 *et seq.* without a pre-seizure notice and hearing on the basis of conclusory allegations which fail to provide probable cause and fail to reveal that they are grounded on unreliable hearsay.

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OPINIONS BELOW

The opinion of the Third Circuit Court of Appeals (App. 1a-16a)[1] is reported at 937 F.2d 98 (3d Cir. 1991). The opinions of the district court denying Cross-Petitioner, Beth Ann Goodwin's, motion to dismiss and for summary judgment (App. 17a-35a) and certifying certain questions for interlocutory appeal (App. 38a-45a) are reported, respectively, at 738 F.Supp. 854 (D.N.J. 1990) and 742 F.Supp. 189 (D.N.J. 1990).

JURISDICTION

The judgment of the Third Circuit Court of Appeals was entered on June 17, 1991. A Petition for Rehearing was denied on August 13, 1991 (App. 46a-47a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). This Cross-Petition is filed pursuant to R. 12.3 and within thirty days of November 15, 1991 when the United States of America's Petition for a Writ of Certiorari in *United States v. A Parcel of Land* (Dkt. No. 91-781) was received by counsel for the Cross-Petitioner, Beth Ann Goodwin.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth and Fifth Amendments to the Constitution of the United States. Section 511 of the Controlled Substances Act of 1970 set forth at 21 U.S.C. 881; the

[1] The Appendix to the Petition of the United States will be referenced as (App. [pages]). The Appendix of the Cross-Petitioner will be referenced as (C.P. App. *infra*, [pages]).

general federal immunity statute set forth at 18 U.S.C. 6002 et seq.; the statute of limitations from the customs laws set forth at 19 U.S.C. 1619; the statute of limitations applicable to forfeitures set forth at 28 U.S.C. 2462.

STATEMENT

In April of 1989 the United States government (the "government") seized Ms. Goodwin's home where she had resided with her minor children since she purchased the property in 1982. Ms. Goodwin lived with Joseph Brenna in a relationship akin to marriage until 1987. Mr. Brenna provided Ms. Goodwin with the money she used to purchase the house. Ms. Goodwin was separated from Mr. Brenna in 1987. She has treated the property as her own, maintaining responsibility for taxes, upkeep and improvements. (C.P. App. *infra*, 14a-15a).

In May 1988, in connection with the criminal investigation of Mr. Brenna, the government compelled Ms. Goodwin to provide testimony while promising that her testimony would not be used against her. (App. 10a). Ms. Goodwin's immunized testimony was used to prepare the forfeiture complaint. (App. 10a) The government seized her house on the grounds that the funds Ms. Goodwin utilized to purchase the property were derived from a drug transaction in which Mr. Brenna was involved. (C.P. App. *infra*, 2a). To date, the government has not identified with any reasonable specificity the generation of any money to Mr. Brenna from any drug transaction prior to 1985. A review of the April 1990 indictment of Mr. Brenna, filed a full year after Ms. Goodwin's home was

seized, reveals no allegations of any specific drug transaction prior to 1985. (C.P. App. *infra*, 37a to 44a).

No pre- or post-seizure evidentiary hearing was ever held. Instead the Court below stayed all proceedings in the civil forfeiture action until Brenna's criminal trial was concluded. (App. 34a) The government refused to produce for discovery the one witness (Mazacco) who allegedly provided some factual basis for the claim that the funds Goodwin used to purchase the property were the proceeds of a drug transaction. (App. 33a; C.P. App. *infra*, 23a; 28a; 34a-36a). Nevertheless, the district court ruled, as a matter of law, that at trial (when the stay is lifted), Goodwin would prevail only if she could prove that the original funds provided to her by Brenna a decade ago were not proceeds from a drug transaction. Since Brenna was a fugitive and since the government refused to produce Mazacco the only other witness with any alleged pertinent knowledge, the district court virtually foreclosed the claimant from contesting that issue. (App. 42a n.3).

Pursuant to 28 U.S.C. 1292(b), the district court certified four questions for appeal holding that each was a purely legal issue involving "substantial grounds for difference of opinion," making guidance from a court of appellate jurisdiction necessary. (App. 38a-45a). The district court stayed all further discovery and ruled for the government on each such issue as a matter of law, recognizing that its decision "verges on a final judgment for the government" (App. 34a; 42a at n.3).

The Third Circuit affirmed the district court on each issue except the innocent owner issue but similarly noted

the lack of controlling authority and differences of appellate opinion in certain areas. (App. 1a-16a) While specifically endorsing the Second Circuit's holding in *United States v. Premises and Real Property at 4492 South Livonia Road, Livonia New York,* 889 F.2d 1258 (2d Cir. 1989) that the seizure of a home pursuant to 21 U.S.C. 881 without notice and a hearing violates due process (App. 5a), the Third Circuit did not dismiss the Complaint because it determined that the subsequent indictment of Brenna provided the probable cause necessary to support the seizure filed a year earlier. (App. 5a-6a) Ms. Goodwin's immunized testimony had been gathered for the criminal investigation that produced the Brenna indictment. Presumably the indictment was based, in part, on Goodwin's immunized testimony. There was no showing to the contrary.

The Complaint itself is conclusory. It is devoid of specific facts necessary to provide probable cause that the funds ultimately used to purchase the house were the product of a drug transaction rather than a product of a boat business which was referenced by Ms. Goodwin in her immunized and sworn testimony. Nevertheless, no references to other income from boat sales or a boat business were mentioned in the Verified Complaint. (Compare C.P. App. *infra,* 8a with 24a-25a; 30a-32a). Nevertheless, the Third Circuit permitted the seizure and forfeiture action to proceed without any pre- or post-seizure evidentiary hearing whatsoever.

REASONS FOR GRANTING THE CROSS-PETITION FOR CERTIORARI

The government argues that the Third Circuit's decision to protect an innocent owner from the forfeiture of her home undercuts its efforts to eradicate illegal drug trafficking. (Gov't. Petition at 9 and 23). The legislative history to other portions of these same drug forfeiture statutes reveals the intent of Congress to impose punishments even more severe than traditional criminal punishment on drug violators by virtue of these forfeiture statutes:

> Today, few in Congress or the law enforcement community fail to recognize that the traditional criminal sanctions of fine and imprisonment are inadequate to deter or punish the enormously profitable trade in dangerous drugs, which, with its inevitable attendant violence is plaguing the country. Clearly, if law enforcement's efforts to combat . . . drug trafficking are to be successful, they must include an attack on the economic aspect of these crimes. Forfeiture is the mechanism through which such an attack may be made.

S. REP. No. 98-225, 98th Cong., 2d Sess. 1991, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3374.

The enforcement of this forfeiture program with limited tolerance for the rights of innocent citizens warrants review by this Court. The government's expansive seizure program carried out on a nationwide basis to impose forfeitures even of citizens' homes is essentially criminal in nature. The visitation of such forfeitures upon innocent

parties warrants a review of whether such innocent persons are entitled to the same protections to which criminal defendants are entitled.

An action to forfeit personal property under other statutory provisions has been held to be quasi-criminal in nature and to warrant various procedural protections offered by the Constitution. The Supreme Court recognized this in *Boyd v. United States*, 116 U.S. 616, 633-34 (1886) when it stated:

> We are also clearly of opinion that proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offenses committed by him, though they may be civil in form, are in their nature criminal. In this very case, the ground of forfeiture . . . consists of certain acts of fraud . . . which are made criminal by the statute;. . . . These are the penalties affixed to the criminal acts; the forfeiture sought by this suit being one of them. If an indictment had been presented against the claimants, upon conviction the forfeiture of the goods could have been included in the judgment. If the government prosecutor elects to waive an indictment and to file civil information against the claimants (that is, civil in form) can he by this device take from the proceeding its criminal aspect and deprive the claimants of their immunities as citizens, and extort from them a production of their private papers, or, as an alternative, a confession of guilt? This cannot be. The information, though technically a civil proceeding, is in substance and effect a criminal one . . . As, therefore, suits for penalties and forfeitures, incurred by the commission of offenses against the law, are of this quasi criminal nature, we think that they are within the

> reason of criminal proceedings for all the purposes of the Fourth Amendment of the Constitution, and of that portion of the Fifth Amendment which declares that no person shall be compelled in any criminal case to be a witness against himself.

This Court has followed an "abstract approach" to determine whether the constitutional protections offered by the Bill of Rights apply to proceedings denominated as civil but which impose penalties or criminal proportions. Each penalty statute should be individually analyzed for this determination. *See United States v. Halper*, 490 U.S. 435 (1989). *United States v. Ward*, 448 U.S. 242, 248-51 (1980).

This Court has not specifically addressed whether the constitutional protections of the Fourth and Fifth Amendments apply to civil forfeitures pursuant to 21 U.S.C. 881. It has, however, recognized the applicability of the self-incrimination clause and the due process clause of the Fifth Amendment and the Fourth Amendment to various forfeiture statutes. *United States v. U.S. Coin & Currency*, 401 U.S. 715, 719 (1971); *United States v. $8,850 in U.S. Currency*, 461 U.S. 555 (1983); *One 1958 Plymouth Sedan v. Commonwealth of Pennsylvania*, 380 U.S. 693 (1965), where this Court again indicated that "a forfeiture proceeding is quasi-criminal in character. The object, like a criminal proceeding, is to penalize for the commission of an offense against law." 380 U.S. at 700. In *United States v. Riverbend Farms, Inc.*, 847 F.2d 553, 558 (9th Cir. 1988) the Ninth Circuit concluded that the criminal or quasi-criminal nature of such forfeiture proceedings under other statutes requires the application of the constitutional protections under the Fourth and Fifth Amendments. *But see United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982);

Founding Church of Scientology v. United States, 409 F.2d 1146, 1150 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 963 (1969).

The government seeks to forfeit the house and home of Beth Ann Goodwin which she has now maintained for over nine (9) years. There is no claim that the government or the public has been harmed or damaged by Ms. Goodwin's conduct, nor is there any claim that the forfeiture of Ms. Goodwin's home will remedy a specific monetary harm that has been inflicted upon the federal government by her. This penalty has no identifiable remedial aspect; it is a purely criminal sanction. Forfeiture of the homes of innocent partners in a spousal type relationship operates to penalize wives and children for the alleged but unproven crimes of their husbands and fathers. Consistent with this Court's recognition of the sanctity of the home, *e.g.*, *United States v. Karo*, 468 U.S. 705, 714 (1984), and *Payton v. New York*, 445 U.S. 573, 590 (1980), the protections afforded by our Bill of Rights should apply to such actions.

1. OUR CONSTITUTION SHOULD NOT PERMIT THE GOVERNMENT TO COMPEL TESTIMONY FROM A CITIZEN AND THEN USE THAT TESTIMONY TO SEIZE AND FORFEIT THAT CITIZEN'S HOME.

No case has squarely presented to this Court the issue of whether testimony may be compelled from a citizen by force of law and promise of immunity and thereafter be utilized to seize and forfeit that person's home in a quasi-criminal proceeding. The Complaint to

seize and forfeit herein was concededly prepared based upon such compelled and immunized testimony. (App. 10a).

Both the Third Circuit and the district court held that evidence independent of Ms. Goodwin's immunized testimony support the seizure of her home. Yet the evidence cited is primarily the indictment of Joseph Brenna which was not returned until April, 1990, a full year after the seizure. Moreover, Ms. Goodwin's testimony was obtained for the criminal case and given to Brenna's prosecutors before his indictment; logically, the indictment was based upon her immunized testimony. No showing was ever proffered or made below that the indictment was based on independent evidence.[2]

The effect of the Third Circuit's decision is to dilute the standards in this quasi-criminal forfeiture case from those standards applicable in criminal cases as announced by this Court in *Kastigar v. United States*, 406 U.S. 441 (1972). The Third Circuit's decision creates a conflict with the District of Columbia Circuit's holding on the permissible use of immunized testimony as announced in *United States v. North*, 910 F.2d 843, *mod'd on*

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[2] The district court presumed that since Goodwin claimed innocence, *i.e.* a lack of knowledge of Brenna's criminal activity, the indictment against Brenna was obtained independently. (App. 21a) That is a faulty premise. In *North*, the defendant did not confess to crimes in his immunized testimony but his statements provided circumstantial evidence which furthered his prosecution. Goodwin's admission that she received money from Brenna provided circumstantial evidence presumably utilized to further the investigation that led to the Brenna indictment.

rehearing en banc, 920 F.2d 940 (D.C. Cir. 1990), *cert. denied,* 111 S.Ct. 2235 (1991). In *North* a panel of the District of Columbia Circuit reviewed other Circuit authority establishing that a grand jury indictment based in part upon the defendant's immunized testimony would be dismissed in most circuits of the country. 910 F.2d at 869-70.[3] Thereafter, the District of Columbia Circuit sitting *en banc* in *North* held that the government may not use the immunized testimony in any fashion. 920 F.2d at 948.

There is a lack of authority on the protection afforded an individual from the subsequent use of immunized testimony in a quasi-criminal action. Opinions in various circuits provide divergent rationales. *Compare, In re Grand Jury Investigation,* 657 F.2d 88, 91 (6th Cir. 1981), where the court indicated that the witness will have the opportunity to utilize the immunization as a defense in such a forfeiture proceeding, with *In re Daley,* 549 F.2d 469, 478 (7th Cir. 1977) holding that immunity will not protect a witness from use of his testimony in state disciplinary and disbarment proceedings. *See also, In re: Grand Jury Proceedings,* 835 F.2d 375, 3276 (1st Cir. 1987).

An uncharged person such as Ms. Goodwin, facing the forfeiture of her home, should have the same constitutional protections provided to a criminal defendant. The United States' civil forfeiture complaint based on Ms. Goodwin's immunized testimony should be dismissed.

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[3] The Third Circuit's rationale conflicts with the rationale in these other circuits as well.

2. THE APPROPRIATE STATUTE OF LIMITATIONS IS 28 U.S.C. 2462.

The purchase of the subject property by the claimant was concluded in November 1982 with funds which the government claims already belonged to it at that time. This action seeks a "forfeiture" of property. 28 U.S.C. 2462 provides:

> Time for commencing proceedings: Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of *any civil find, penalty, or forfeiture, pecuniary or otherwise,* shall not be entertained unless commenced within five years *from the date when the claim first accrued if,* within the same period, the offender or *the property is found within the United States* in order that proper service may be made thereon. (Emphasis added).

The statute of limitations relied upon by both courts below was the customs statute of limitations, 19 U.S.C. 1621, which permits a forfeiture five years after the discovery by the government of its claim. (App. 14a-15a; 32a-33a). Although the relevant drug forfeiture statutory provision, 21 U.S.C. 881(d), incorporates the customs procedures for use in drug seizures, it does not incorporate the customs statute of limitations. Instead, 21 U.S.C. 881(d) specifies the provisions of the customs law that *are* applicable and conspicuously omits the customs statute of limitations. Section 881(d) provides that only the following statutes are incorporated:

> (d) The provisions of law relating to the seizure [19 U.S.C. 1604] summary and judicial forfeiture, [19 U.S.C. 1609 and 1610] and

> condemnation of property for violation of the customs laws; [19 U.S.C. 1608] the disposition of such property or the proceeds from the sale thereof [19 U.S.C. 1613] the remission or mitigation of such forfeitures; [19 U.S.C. 1618] and the compromise of claims shall apply to seizures and forfeitures incurred or alleged to have been incurred, under the provisions of this subchapter; [19 U.S.C. 1617]. . . . except that such duties as are imposed upon the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeitures of property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer. [bracketed references added]

Other portions of the customs statutory scheme were not incorporated as well. *See, e.g.*, 19 U.S.C. 1619, 1620 providing for the payment to informers of 25 percent of the amount seized. These sections immediately precede 1621, the customs statute of limitations. Since 1621 is not explicitly incorporated, the statute of limitations explicitly applicable to forfeitures, 28 U.S.C. 2462, should apply.

When Congress intends to incorporate the more expansive customs statute of limitations which permits the government to forfeit a property five years after it discovers its claim, it knows how to do so. *See United States v. The Brazil*, 134 F.2d 929 (7th Cir. 1943) where that court considered statutory language under the Shipping Act (46 U.S.C. 836), which incorporated *all* of the custom laws wholesale. Therefore, in *Brazil* the Court applied the

customs statute of limitations to the Shipping Act. Congress' failure to explicitly incorporate an expansive statute of limitations should be deemed intentional. The federal drug forfeiture scheme is criminal in nature. Almost all federal criminal statutes are subject to a finite five-year statute of limitations and not a limitation beginning when the government discovers the offense. *See* 18 U.S.C. 3282. The forfeitures provided under 21 U.S.C. 881 are essentially criminal. The principle requiring strict construction of criminal statutes should be applied to require that the more restrictive 28 U.S.C. 2462 apply. Absent such a construction a true anomaly results. Criminal defendants could be subject to a five-year period of limitation for criminal forfeiture but other innocent parties could be subject to forfeiture for virtually unlimited periods of time. Direction from this Court is required to prevent such anomalous results. Should this Court consider Congress' intent as to the innocent owner provision of 21 U.S.C. 881, it should also consider Congress' intent as to the appropriate time limitations for such actions.

3. THE FOURTH AND FIFTH AMENDMENTS REQUIRE THAT A SEIZURE AND FORFEITURE OF A HOME NOT BE UNREASONABLY DELAYED.

The Third Circuit below was unwilling to consider whether any period of delay which preceded the filing of the seizure action. The Court would only consider a delay between the seizure and the filing of the forfeiture action. (App. 15a). The delay from the date the government was on notice of the violations and the overall time the innocent owner has possessed the property should be considered.

A seizure and forfeiture of a home based on stale information such as that herein should be held "unreasonable" when measured against the Fourth Amendment and the due process requirements of the Fifth Amendment. In *Sgro v. United States*, 287 U.S. 206 (1932), a warrant was obtained to search a hotel for liquor. An illegal purchase had allegedly been made in the hotel. The first warrant was not executed. Thereafter, a second warrant was issued based on the ten-day-old affidavit. Holding that the search under the reissued warrant was illegal, this Court held:

> While the Statute does not fix the time within which proof of probable cause must be taken by the judge or commissioner, it is manifest that the proof must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time. Whether the proof meets this test must be determined by the circumstances of each case . . . The proof supplied must have appropriate relation to the application for the new warrant . . . The commissioner has no authority to rely on affidavits which have sole relation to a different time and have not been brought down to date or supplemented so that they can be deemed to disclose grounds existing when the new warrant is issued. The new warrant must rest upon a proper finding and statement by the Commissioner that probable cause then exists. That determination, as of that time, cannot be left to a mere inference or conjecture.

287 U.S. at 210-211. *See United States v. Neal*, 500 F.2d 305 (10th Cir. 1974) where an affidavit based on facts that were known for three months was held to be unconstitutionally stale and the search invalid under the Fourth Amendment.

The Third Circuit and the district court held there was no requirement of contemporaneity of the seizure with either the date of the offense or the date that the government was provided probable cause of the offense. (App. 15a-16a; 30a-31a). That holding conflicts with the First Circuit's decision in *United States v. Pappas*, 613 F.2d 324 (1st Cir. 1979). In *Pappas*, the First Circuit sitting *en banc* addressed for the first time the issue of whether 21 U.S.C. 881 authorizes a seizure "when the events providing the probable cause are remote in time from the actual seizure and no exigent circumstances exist." 613 F.2d at 327. The First Circuit noted that this Court has never "sanctioned the issuance" of a search and seizure "in the context of a criminal or quasi-criminal proceeding" on less than probable cause. That court required that the seizure and a subsequent forfeiture proceeding occur roughly contemporaneously; therefore, the seizure eleven months later was too late and constitutionally defective. The Fourth Circuit and the Fifth Circuit also disagree with the holding by the First Circuit. *United States v. One Mercedes Benz*, 711 F.2d 1297, 1300-1302 (5th Cir. 1983); *United States v. Kemp*, 690 F.2d 397, 401 (4th Cir. 1982); *see generally, In re Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 n.4 (1st Cir. 1988), where a panel of the First Circuit questioned *Pappas* and *United States v. One 1977 Lincoln Mark V Coupe*, 643 F.2d 154, 158 (3rd Cir. 1981), where a panel of the Third Circuit suggested that a timeliness requirement may be appropriate.

A forfeiture proceeding in its entirety should be subject to the Fourth Amendment. A forfeiture proceeding is an elongated but permanent seizure. Forfeiture of a home based on stale information is unreasonable and imposes

unfair prejudice on our citizens. The costs of maintenance, taxes and improvements all are borne during such delays. Children become emotionally attached to their home during such periods of delay. Any substantial delay by the government in bringing a seizure and forfeiture action against a home should render the action unreasonable pursuant to the Fourth Amendment.[4]

The holding below also conflicts with this Court's recognition in *United States v. $8,850 in United States Currency*, 461 U.S. 555 (1983) that due process may be violated in forfeiture actions where the government does not act diligently and reasonably in instituting such proceedings. In particular, this Court noted that the four-factor balancing test articulated in *Barker v. Wingo*, 407 U.S. 514 (1972) has direct application to forfeiture actions. The four factors to be weighed by courts in assessing such delay are as follows: (1) the length of delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) prejudice to the defendant. *United States v. $8,850, supra*, 461 U.S. at 564.

When the owner of the property is not alleged to be involved in the illegal activity at issue, a rule requiring the government to institute a prompt and timely seizure and forfeiture is even more appropriate. If Ms. Goodwin

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[4] The court below also indicated that this seizure and forfeiture proceeding did not impose a sufficiently significant deprivation of property to warrant a dismissal of the action for undue delay since Ms. Goodwin remained a tenant in the property. (App. 16a) That holding conflicts with this Court's recent holding in *Connecticut v. Doehr, supra*, ___ U.S. ___, 111 S.Ct. at 2112-13 (1991) holding that the encumbering of title alone is a constitutionally significant deprivation.

had provided $50,000 of the money transferred to her by Brenna to her oldest child to start a business, would the government be able to forfeit that entire business, no matter how large, years later? The reasonableness requirements of the Fourth Amendment and the due process requirement of the Fifth Amendment require that protection be afforded against belated seizures and forfeiture actions, particularly when filed against individuals innocent of the alleged conduct involved in the illegal activity.

The evidence to confront the seizure instituted only on probable cause disappears over time. In this case, Brenna is a fugitive and unavailable; therefore, the district court's requirement that Ms. Goodwin prove the source of Brenna's money provided almost a decade ago is an impossible burden. The prejudice to Ms. Goodwin in forfeiting her home years after its purchase by her, especially under the foregoing circumstances, is apparent. Moreover, it demonstrates the need for this Court to address this novel issue.

4. PRIOR NOTICE, A PRE-SEIZURE HEARING AND SPECIFIC PROBABLE CAUSE ARE CONSTITUTIONALLY REQUIRED BEFORE A CONCEDEDLY INNOCENT PERSON'S HOME IS SEIZED.

A. Lack Of Notice And A Hearing Is Unconstitutional.

This Court has always provided significantly greater and special protection for a citizen's home than for personal property. *See, e.g., United States v. Karo*, 468 U.S. 705, 714 (1984); *Payton v. New York*, 445 U.S. 573, 590 (1980).

This Court has never held that a home can be seized from its owner and occupant consistent with our Constitution without prior notice and a hearing.[5] There is a split of authority in the circuits as to whether notice and a hearing is required before a home is seized pursuant to 21 U.S.C. 881. The Third Circuit and the Second Circuit have held that due process is violated by such a seizure while the Eleventh Circuit has held to the contrary. *Compare United States v. Livonia Road, supra,* 889 F.2d at 1267 and the opinion below (App. at 5a) with *United States v. A Single Family Residence and Real Property Located at 900 Rio Vista Boulevard, Ft. Lauderdale, Florida,* 803 F.2d 625, 632 (11th Cir. 1986). In *Department of Law Enforcement v. Real Property,* 1991 WL 155125, ___ So.2d ___ (Fla. 1991), the Supreme Court of Florida held that due process under its state constitution requires that before real property is seized for criminal violations "that the state must provide notice and schedule an adversarial hearing for interested parties on the question of probable cause prior to any initial restraint." 1991 WL at 155125 at p. 7.

In *Connecticut v. Doehr,* ___ U.S. ___, 111 S.Ct. 2105 (1991), this Court held that state laws which permit the seizure and encumbering of a home or real property without prior notice and a hearing violate due process. Based upon this holding, the Court invalidated Connecticut's pre-judgment attachment procedures. The *Doehr*

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[5] This court has held that due process permits a seizure of personal property without a prior hearing and notice when violation of the criminal laws are alleged. *See United States v. $8,850,* 461 U.S. 555 (1983); *Calero-Toledo v. Pearson Yacht Leasing Co.,* 416 U.S. 663 (1974).

decision also recognized that a rapid post-seizure hearing could not cure the constitutional defect arising from the lack of a prior hearing.[6] *Id.* at 2114-15. If the due process clause requires such protections from the operation of state statutes, the federal government should be similarly obliged to provide them when it seizes a home.

The Third Circuit permitted the seizure and forfeiture proceeding below to continue on the grounds that adequate independent probable cause was demonstrated. The verified Complaint reveals that inadequate facts to provide probable cause were provided. (C.P. App. *infra* 7a-10a). The only specific factual allegations (which are not conclusory) are that cash was transferred from the Caribbean to Ms. Goodwin's attorney in the United States and that she used those funds to purchase the home (C.P. App. *infra* 8a). The holding of the courts below that such

[6] The lack of prior notice and a hearing in this case was compounded by the lack of any meaningful post-seizure hearing. An evidentiary hearing was never provided at all. The government refused to produce the sole witness who allegedly had knowledge of Brenna's criminal activities. (App. 33a-34a). The district court reviewed the defendant's motion to dismiss and for summary judgment based on written submissions and affidavits. Brenna was a fugitive and unavailable and the government refused to produce Mazacco, the sole witness, who allegedly suggested a relationship between the purchase of Ms. Goodwin's home and some drug transaction. The district court's rulings as a matter of law virtually terminated Goodwin's case without any evidentiary proceedings whatsoever. (App. 42a n.3).

facts constituted probable cause conflicts with the holding of other circuits in that regard. *See United States v. $38,000 in U.S. Currency,* 816 F.2d 1538 (11th Cir. 1987).

Whether or not valid and independent probable cause was demonstrated, we ask this Court to hold that a seizure and forfeiture proceeding relating to a home of a person concededly innocent of an offense warranting forfeiture must be instituted in a constitutional manner with notice and a pre-seizure evidentiary type hearing.

B. At Least The Same Probable Cause As Required By The Fourth Amendment in Criminal Cases Should Be Required To Pursue A "Quasi Criminal" Seizure And Forfeiture Of A Home.

i. The Complaint And Affidavit Were Unconstitutionally Vague And Lacking in Specifics.

In this case, a *pro forma* Complaint containing conclusory allegations that Beth Ann Goodwin was a nominee for Brenna and that the house was purchased with proceeds of drug transactions was filed (C.P. App. *infra,* 12a). No particularized facts were identified other than that cash was the original source of funds. No indication that the source of any evidence was an informant was contained therein. Instead, the affiant, Drug Enforcement Agent ("DEA") Giacobbe, simply stated that "the facts as set forth in the complaint are, to the best of my information, knowledge and belief true."[7] Yet, Giacobbe did not

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[7] A *pro forma* verified complaint and a similar procedure was invalidated as violative of the due process requirements of the Fourteenth Amendment by this Court. *Connecticut v. Doehr,* ___ U.S. ___, 111 S.Ct. at 2110, *supra.*

witness any alleged drug transaction. Giacobbe had no relevant personal knowledge of any evidential facts. (C.P. *infra*, 23a, 26a, 28a; 32a-36a).

In *United States v. $39,000 in Canadian Currency*, 801 F.2d 1210, 1219 n.8 (10th Cir. 1986), the court held that it need not reach the Fourth Amendment issues since the Supplemental Admiralty and Maritime Claims Rule E(2)(a) required that a forfeiture complaint must contain verified and specific factual allegations sufficient to support an inference that the property is subject to forfeiture. *See also, United States v. U.S. Currency, supra*, 816 F.2d at 1548.

It is well established that probable cause should be based on specific facts and inferences provided by the warrant application.

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances *set forth in the affidavit before him*, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. (emphasis added)

Illinois v. Gates, 462 U.S. 213, 238 (1983). This Court has previously required that sufficient information be furnished to allow the court to determine the existence of probable cause to search and therefore to seize.

> [I]n justifying the particular intrusion the police officer must be able to point to specific and articulable facts which . . . reasonably warrant intrusion . . . This demand for specificity in the

> information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence.

Terry v. Ohio, 392 U.S. 1, 21 n. 18 (1968). When issuing warrants a court's role "cannot be a mere ratification of the bare conclusions of others." *Illinois v. Gates, supra*, 462 U.S. at 239.

The Third Circuit and district court decisions herein that adequate independent probable cause was demonstrated by the facts pled in the verified complaint conflict with the holding of the Tenth and Eleventh Circuits and with prior applicable Fourth Amendment principles as announced by this Court.

ii. The Affidavit Failed to Reveal That it was Based On Information Provided By An Unreliable Informant.

DEA Agent Giacobbe testified at a deposition. He revealed, for the first time, that the basis for the Complaint was not his own personal knowledge but rather was Ms. Goodwin's immunized testimony and an informant named Mazacco. (*E.g.*, C.P. App. *infra*, 27a-28a). Moreover, neither Mazacco nor Giacobbe had an adequate factual basis for asserting that funds traceable to a drug transaction were used to purchase the house in 1982. (C.P. App. *infra*, 32a-36a).

The Complaint and Giacobbe's affidavit were drafted in reliance upon information provided by an admitted drug dealer who escaped prosecution on numerous drug violations in consideration for providing information to the government concerning this forfeiture action. (C.P.

App. *infra*, 28a-30a). The court reviewing the seizure Complaint could never have considered these matters or the reliability of the informant since they were never disclosed. The district court's inability to review Mazacco's reliability at the time of the seizure renders any finding of probable cause defective. *Jones v. United States*, 362 U.S. 257, 269 (1960); *Nathanson v. United States*, 290 U.S. 41 (1933). The complaint and verification do not even go so far as to claim that Giacobbe has "received reliable information from a credible person," which this Court found to be necessary in *Aguilar v. Texas*, 378 U.S. 108 (1964); therefore, the Complaint should be dismissed as defective from the onset. *Illinois v. Gates, supra*, 462 U.S. at 238.

We ask this Court to clarify that the Fourth Amendment and the due process clause of the Fifth Amendment apply to these quasi-criminal forfeiture actions of a home so that prior notice, an evidentiary hearing and specific probable cause are required.

5. CONSIDERATION OF THE ISSUES PRESENTED BY THE GOVERNMENT'S PETITION FOR CERTIORARI SHOULD BE ACCOMPANIED BY CONSIDERATION OF THE ISSUES PRESENTED BY THE CROSS-PETITION.

The plain language of 21 U.S.C. 881(a)(6) indicates that protection from civil forfeiture is provided to all innocent owners and *not* merely to innocent owners who are bona fide purchasers for value. The government cites numerous other courts that have held that the relation

back doctrine cuts off the rights of all innocent but subsequent owners unless they are purchasers for value. When Congress intends to limit protection from criminal forfeiture to bona fide purchasers for value, it has expressed this intention through unequivocal language stating that relief from such forfeitures should only be available to "bona fide purchasers". *See* 18 U.S.C. 1963(c) and 12 U.S.C. 853(c). It did not do so herein and as the Third Circuit properly noted, such decisions are contrary to the plain statutory language. (App. 8a-9a).

The legislative history pertinent to this statutory provision reveals that Congress intended to exempt *all* subsequent innocent owners from forfeiture under 21 U.S.C. 881, not just bona fide purchasers for value. As the Court in *United States v. One Single Family Residence*, 894 F.2d 1511, 1514 (11th Cir. 1990) noted:

> [A]s Congress escalated its offense in the ongoing "war against drugs" by expanding the scope of property subject to civil forfeiture, it coupled with the forfeiture a proviso, taken verbatim from section 881(a)(6), protecting innocent owners. Explaining the aim of the innocent-owner exception, Congress stated:
>
> > [I]t should be pointed out that no property would be forfeited under the Senate amendment to the extent of the interest of any innocent owner of such property. The term "owner" should be broadly interpreted to include any person with a recognizable legal or equitable interest in the property seized. Specifically, the property would not be subject to forfeiture unless the owner of such property knew or consented to the fact

> that [the property was used for or traceable to illegal drug activities].
>
> Joint Explanation Statement of Titles I & II, 124 Cong. Rec. S 17647, *reprinted in* 1978 U.S. Code Cong. & Admin. News 9518, 9522.

Senators Culver and Nunn spoke on the floor of the Senate regarding the innocent owner provision. Senator Culver explained that the innocent owner provision was added as a result of "concerns" expressed by members of the Juvenile Delinquency Subcommittee:

> Specifically, it was noted that the original language could have been construed to reach properties traceable to the illegal proceeds but obtained by *an innocent party* without knowledge of the manner in which the proceeds were obtained. The original language is modified in the proposed amendments in order to protect *the individual who obtains ownership of proceeds* with no knowledge of the illegal transaction. (Cong. Rec. S.23056 (July 27, 1978)) (emphasis supplied).

Senator Nunn stated that the innocent owner provision was added:

> "to make it clear that a bona fide *party* who has no knowledge or consent to the property he owns having been derived from an illegal transaction, that *party* would be able to establish that fact under this amendment and forfeiture would not occur."
>
> That is the purpose of the wording added to the modification in addition to some other wording in the modification making the amendment broader than it otherwise would have been.

> (Cong. Rec. S 23057 (July 27, 1988)) (emphasis supplied).

In *United States v. Coin and Currency*, 401 U.S. 715 (1971) this Court stated:

> When the forfeiture statutes are viewed in their entirety, it is manifest that they are intended to impose a penalty only upon those who are significantly involved in a criminal enterprise.

401 U.S. 721-22. The government's petition necessarily involves certain related issues. When this Court examines Congress' intent when it enacted the drug forfeiture statutes to determine the extent of the protection intended for innocent owners, it should also examine Congress' intent with respect to the protections provided by the statute of limitations and by the Fourth and Fifth Amendments. They are intertwined.

Giacobbe's deposition made plain that the government's informant had no personal knowledge that the money transferred to Goodwin in 1982 and later used to buy the home was derived from drug transactions. (C.P. App. *infra*, 32a-36a) The claimant filed a summary judgment motion on the grounds that the probable cause standards and the "substantial connection" standards required by other Circuits were not satisfied. Other circuits have mandated that the government provide evidence of "a substantial connection between the property to be forfeited and the underlying criminal activity" prior to sanctioning forfeiture of an innocent owner's property. *United States v. Real Property and Residence*, 921 F.2d 1551, 1555-56 (11th Cir. 1991); *United States v. Santoro*, 866 F.2d 1538, 1542 (4th Cir. 1989); *see also, United States v. Property in Greene and Tuscaloosa Counties*, 893 F.2d 1245, 1249 (11th

Cir. 1990); *United States v. One 1986 Nissan Maxima GL*, 895 F.2d 1063 (5th 1989).1990); *United States v. Padilla*, 888 F.2d 642 at 643 (9th Cir. 1989). Neither court below made such a finding. The district court entered a judgment virtually concluding the case without any trial or hearings. (App. 42a n.3). The district court presumed that since the $216,000 wired to claimant's attorney was traceable to cash, that fact alone satisfied the substantial connection requirement. (App. 24a, 13a-14a). That holding conflicts with *United States v. U.S. Currency, supra*, 816 F.2d at 1548 and the rationale of the circuits cited above.

Innocent owners should be protected by 21 U.S.C. 881(a)(6) from forfeitures without evidence of a "substantial connection" between the property to be forfeited and the criminal offenses. That standard ties into the requirements of the Fourth Amendment which we ask this Court to apply to such quasi-criminal forfeitures.

The government suggests that the federal criminal case against Brenna will operate to deprive Goodwin of her home and that this possibility creates an anomaly caused by the Third Circuit decision. (Gov't. petition at p. 21 n.10). No such anomaly exists. Goodwin has title to the property and has possessed it for a decade. Brenna has never owned the property. In the context of Brenna's criminal case, the government can only forfeit Brenna's interest in the property. Surely the government does not contend it can deprive Goodwin of her home in a criminal case to which she is not a party and has never been charged.

In *United States v. One Single Family Residence*, 894 F.2d 1511 (11th Cir. 1990) the Eleventh Circuit decided

that the interest of an innocent spouse was protected as a matter of law from the reach of the drug forfeiture statutes. To forfeit an innocent spouse's property interest was deemed an unconstitutional deprivation of property. 894 F.2d 1516. 21 U.S.C. 881(a)(6) should be construed to protect the rights of *all* innocent owners including spousal interests (whether by transfer or operation of law). The Eleventh Circuit considered whether application of 21 U.S.C. 881 to forfeit the home of an innocent owner who obtained her interest in the context of a spousal relationship should be struck down as an unconstitutional taking. This Court should similarly consider the constitutional issues when weighing the protection provided to innocent owners and should therefore accept consideration of the Fourth and Fifth Amendments issues raised herein, if it accepts the government's petition.

The government's petition necessarily raises these issues involving the analysis of the application of the Fourth and Fifth Amendments to forfeiture actions under 21 U.S.C. 881 to innocent owners. The government has utilized Goodwin's compelled and immunized testimony to create the Complaint to seize her home. The government waited for over two years after it was on notice of criminal allegations against Brenna and for a year after immunizing Goodwin to institute the forfeiture action, which was filed six and one-half years after she bought her home. The seizure was effected without notice or a hearing based on a Complaint *bare* of any specific facts adequate to provide probable cause that *this* Cross-Petitioner or *her* house were substantially involved in any criminal drug activity. We ask this Court to provide the guidance sought by the district court when it certified the

constitutional and statutory issues raised by these facts as warranting appellate consideration.

CONCLUSION

If the petition by the United States is granted, we submit that the cross-petition for a writ of certiorari should similarly be granted.

Respectfully submitted,

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Beth Ann Goodwin

DATED: December 14, 1991

APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon.
Plaintiff,	:	Civil Action No. 59-1411 HAA
v.	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 BUENA VISTA AVENUE RUMSON, NEW JERSEY	:	SUMMONS AND WARRANT FOR ARREST
Defendant.	:	

TO THE UNITED STATES MARSHALS, AND/OR ANY OTHER DULY AUTHORIZED FEDERAL LAW ENFORCEMENT OFFICER:

A complaint *In Rem* having been filed this 2nd day of April, 1989 in the U.S. District Court, District of New Jersey, alleging that the real property and buildings known as 92 Buena Vista Avenue, Rumson, New Jersey, (hereinafter "defendant property"), was purchased with the proceeds traceable to a felony violation of the Controlled Substances Act and was used to facilitate a violation of Title 21, U.S.C., Sections 841, 846, 848, 952, and 963 and is therefore, subject to seizure and forfeiture to the United States pursuant to Title 21, U.S.C. Section 881(a)(6) and Section 881(a)(7);

And, the court being satisfied that there is probable cause to believe that the defendant property so described therein was purchased with proceeds traceable to a felony violation of the Controlled Substances Act and the grounds for application for issuance of a seizure warrant exist as stated in the annexed complaint Verified by Special Agent RICHARD GIACOBBE of the Drug Enforcement Administration and title having vested in the United States by action of law pursuant to 21 U.S.C. § 881(h);

YOU ARE, THEREFORE, HEREBY COMMANDED to arrest and seize said defendant property and maintain custody as provided by 19 U.S.C. § 1605 until further order of this Court. The United States Marshal for the District of New Jersey (Hereinafter "Marshal's Service") shall use its discretion in maintaining the defendant property, and may use means, both within and without the Marshal's Service, as it deems appropriate to protect and maintain said defendant property;

YOU ARE FURTHER COMMANDED TO POST, upon said defendant property in an open and visible manner, notice of such seizure at the time thereof making the government's seizure open and notorious;

YOU ARE FURTHER ORDERED TO SERVE upon the record owners of the defendant property and its occupants a copy of this warrant and notice of any transaction in connection with this seizure in a manner consistent with Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims within a reasonable time of seizure,

AND IT IS FURTHER ORDERED THAT the Marshal's Service shall conduct a structural inspection of the defendant property, in order to enable the Marshal's Service to determine the condition of the defendant property at the time of its seizure and determine whether any conditions exist that threaten the security of the defendant property or its occupants; and

The Marshal's Service, and any of its authorized agents or designees, shall have at its discretion the authority to dispose of, by any means available, perishable, contaminated, flammable, explosive or volatile items located at the defendant property to the extent that such items constitute a danger to the occupants or to the public. An inventory will be kept as to those items and the method of disposal used; and

If the defendant property is vacant, or becomes vacant, or in uninhabitable, the Marshal's Service, or any of its authorized agents and designees, shall, in addition to an inspection, secure the defendant property and take such action as the Marshal's Service deems necessary to protect the personal property of the occupants of the defendant property; and

FURTHER IT IS HEREBY ORDERED that the record owners and occupants of the defendant property acknowledge in writing the seizure of their interest in the defendant property and service of this warrant. Any occupants of the defendant property who desire to continue to reside at the defendant property following seizure shall promptly enter into occupancy agreements with the Marshal's Service;

AND FURTHER IT IS HEREBY ORDERED that the Marshal's Service shall, in its discretion, arrest any occupant of the defendant property who attempts to obstruct this order or prevent service and seizure as ordered herein;

AND FURTHER IT IS HEREBY ORDERED that a notice of pendency be filed with the appropriate recorder of deeds to give record notice of the forfeiture of the defendant property;

AND UPON APPLICATION of the plaintiff, United States of America, and pursuant to All Writs Act (Title 28 U.S.C. § 1651(a), the Court shall issue any order necessary to effectuate and prevent the frustration of the order of this Court during the execution of this seizure warrant, and after; and

A RETURN of this warrant shall be made within ten (10) days of execution with notice to the Court of the individuals upon whom copies were served and the manner employed, and a statement as to satisfaction of the orders herein issued.

Dated: New Jersey

April 12, 1989

/s/ Harold A. Ackerman
UNITED STATES
DISTRICT JUDGE

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon. HAA
Plaintiff,	:	Civil Action No. 89-1411
v.	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 BUENA VISTA AVENUE RUMSON, NEW JERSEY	:	VERIFIED COMPLAINT
Defendant.	:	

The United States of America by its attorney, Samuel A. Alito, United States Attorney for the District of New Jersey, for its complaint, says:

1. This *in rem* action is brought pursuant to 21 U.S.C. § 881, *et seq.*

2. Jurisdiction is vested in this Court pursuant to 28 U.S.C. §§ 1345, 1355, 1356 and 1395 and Title 21, U.S.C. § 881(a)(6) and § 881(a)(7).

3. That defendant real property with buildings, appurtances [sic], and improvements is more fully described as follows:

Tax Map. Reference: Municipality of Rumson, Block No. 114, Lot No. 13

The property consists of the land and all the buildings and structures on the land in the City of Rumson County of Monmouth and the State of New Jersey. The legal description is:

BEGINNING at a monument standing in the westerly side of Buena Vista Avenue distant 2420.35 feet measured in a southernly direction from the intersection formed by the westerly side of Buena Vista Avenue and the southerly side of Rumson Road, and running thence

1. South 26 degrees 23 minutes east 200.15 feet along the westerly side of Buena Vista Avenue to a point therein; thence

2. South 65 degrees 51 minutes 30 seconds west 409.00 feet to a point; thence

3. North 24 degrees 08 minutes 30 seconds west 160.00 feet to a point; thence

4. North 65 degrees 51 minutes 30 seconds east 180.00 feet to a point; thence

5. North 21 degrees 41 minutes 30 seconds east 57.39 feet to a point; thence

6. North 65 degrees 51 minutes 30 seconds east 180.00 feet to the point and place of beginning.

BEING the same premises known as 92 Buena Vista Avenue, Rumson, New Jersey.

BEING Lot 13 in Block 114 as shown on the official tax map of the Borough of Rumson, Monmouth County, New Jersey, revised December 1962.

The above description is made in accordance with a survey dated November 8, 1978, made by Thomas Santry.

Being the same lands and premises as conveyed to Martha G. Nichols by deed from John Edward Saker and Joan Phyllis Saker, his wife, dated November 13, 1978 and recorded November 15, 1978 in Deed Book 4136, page 92.

4. That defendant real property with buildings, appurtenances, and improvements was purchased with the proceeds traceable to an exchange for a controlled substance in violation of Title 21, United States Code, punishable by at least one year's imprisonment, to wit: Title 21, United States Code, Sections 841, 846, 848, 952 and 963.

5. That defendant real property with buildings, appurtenances and improvements was purchased on November 15, 1982 by Beth Ann Goodwin, nee Shurack as a nominal party for Joseph Anthony Brenna a/k/a Joseph Crawford, a/k/a Joseph Cavanaugh, a/k/a Joe Smith, a/k/a Little Joe for approximately $240,000, with funds provided by Joseph Anthony Brenna which were the proceeds traceable to an exchange for a controlled substance in violation of title 21, United States Code, Sections 841, 846, 848, 952 and 963.

6. That between 1982 and 1986 Joseph Anthony Brenna, a/k/a Joseph Crawford, a/k/a Joseph Cavanaugh, a/k/a Joe Smith, a/k/a Little Joe, has been involved in a scheme to import the controlled substance, marijuana, into the United States, from a place outside thereof, namely Colombia.

7. That the defendant property is currently titled in the name of Beth Ann Shurack by virtue of a Warranty

Deed recorded in Monmouth County Official Records Book 4382, Page 403, on November 30, 1982.

8. That a 10% contract deposit of $24,000 was paid by Beth Ann Goodwin, nee Shurack, through her attorney's, Craig Davis' law firm, Mason, Griffin and Pierson of Princeton, New Jersey on October 29, 1982 to the law firm of Kirkpatrick and Rathman of Rumson, New Jersey, attorneys for the sellers.

9. That Beth Ann Goodwin, nee Shurack has, since 1980, no visible means of support.

10. That Joseph Anthony Brenna on or about November 5, 1982 caused approximately $216,000 to be wire transferred to the law firm of Mason, Griffin and Pierson of Princeton, New Jersey, attorneys for the buyer Beth Ann Goodwin nee Shurack from Onchan International Finance Co. Ltd., Tortola, British Virgin Islands.

11. Approximately $216,000 was transferred by wire to New Jersey by the Bank of Nova Scotia from a certificate of deposit for Onchan International Finance Co. Ltd., Tortola, British Virgin Islands.

12. That Joseph Anthony Brenna obtained this $216,000 which was used to purchase the defendant property from criminal acts involving the importation, possession and distribution of controlled substances.

13. That Joseph Anthony Brenna pled guilty on September 29, 1988 to a misdemeanor violation of 31 U.S.C. § 5322 and 18 U.S.C. § 2, in that he willfully failed to file a Report of International Transportation of Currency or Monetary Instruments ("CMIR") for the transfer of $225,000 as required by 31 U.S.C. § 5316 and 31 C.F.R.

§ 1032. Part of these funds were used by Beth Ann Goodwin, nee Shurack as a nominal party for Joseph Anthony Brenna for maintenance and upkeep of the defendant property.

14. That Joseph Anthony Brenna obtained this $225,000 which was used to maintain the defendant property from criminal acts involving the importation, possession and distribution of controlled substances.

15. That the defendant property has been listed for sale at approximately $1,200,000.

16. That Beth Ann Goodwin, nee Shurack executed a first mortgage lien in favor of Berkely Federal Savings and Loan Association of New Jersey in the amount of $150,000, recorded on May 10, 1988 in Mortgage Book 4491, page 627.

17. That Joseph Anthony Brenna, accumulated huge profits by engaging in multiple criminal acts involving the importation, possession and distribution of controlled substances before, during and after the acquisition of the defendant property by Beth Ann Goodwin, nee Shurack.

18. That because the defendant real property is a proceed traceable to exchanges of controlled substances, such defendant real property is subject to seizure and forfeiture under the provisions of 21 U.S.C. § 881(a)(6).

19. That in or about December 1986, the residence at 92 Buena Vista Avenue, Rumson, New Jersey, was used to facilitate the distribution of proceeds traceable to an exchange for a controlled substance, in violation of Title 21, U.S.C., Section 841, 846, 848, 952 and 963. That in or about December 1986, in the premises located at 92 Buena

Vista Avenue, Rumson, New Jersey, Joseph Anthony Brenna, paid to a crew member of a marijuana smuggling venture, $30,000 which is traceable to an exchange for a controlled substance, in violation of Title 21, U.S.C., Section 841, 846, 848, 952 and 963.

20. That by reason of the foregoing, the defendant real property has become and is forfeited to the United States of America, plaintiff herein, pursuant to the provisions of 21 U.S.C. § 881(a)(7).

WHEREFORE, plaintiff, the United States of America, prays that due process issue to enforce the forfeiture and to give notice to the interested parties to appear and show cause why the forfeiture should not be decreed, and prays that the defendant real property be condemned and forfeited to the United States of America and be delivered into the custody of the United States Marshals Service for disposition according to law, and for such other further relief as this Court may deem just and proper.

The defendant real property is and during the pendency of this action, will remain within the municipality

of Rumson, New Jersey, a part of the District of New Jersey, within jurisdiction of this Court.

Respectfully submitted,

SAMUEL A. ALITO, JR.
United States Attorney

By: Jerome L. Merin
JEROME L. MERIN
Assistant U.S. Attorney
Deputy Chief, Civil Division

I HEREBY CERTIFY that the above and foregoing is a true and correct copy of the original on file in my office.

ATTEST:
WILLIAM T. WALSH, Clerk
United States District Court
District of New Jersey
By: Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon.
Plaintiff,	:	Civil Action No.
v.	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 Buena Vista Avenue Rumson, New Jersey	:	VERIFICATION
Defendant.	:	

RICHARD GIACOBBE, of full age, being duly sworn, deposes and says:

1. I am a Special Agent of the Drug Enforcement Administration, Ft. Lauderdale, Florida office, and as such have been assigned the responsibility for the within matter.

2. The facts as set forth in the Complaint are, to the best of my information, knowledge and belief, true.

Sworn and subscribed to
before me this 20th day
of March, 1989

/s/ Dorry Lingo
Notary Public of the State of Florida
My Commission expires

S/A Richard N. Giacobbe
Special Agent Drug Enforcement
Administration

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon.
Plaintiff,	:	Civil Action No. 89-1411
v.	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 Buena Vista Avenue Rumson, New Jersey	:	VERIFICATION
Defendant.	:	

BETH ANN GOODWIN, of full age, being duly sworn, deposes and says:

1. I am the Beth Ann Goodwin as described in the attached Petition.

2. The facts as set forth in the Petition are, to the best of my information, knowledge and belief, true.

Sworn and subscribed to before me this 19th day of May, 1989.

/s/ Kelly Riley

KELLY RILEY
NOTARY PUBLIC, State of New Jersey
A-35 Qualified in Hudson County
Commission Expires October 25, 1990

/s/ Beth Ann Goodwin
BETH ANN GOODWIN

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	:	Hon.
Plaintiff,	:	Civil Action No. 89-1411
v.	:	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 Buena Vista Avenue Rumson, New Jersey	:	PETITION FOR REMISSION AND MITIGATION OF JUDICIAL FORFEITURE
Defendant.	:	

TO:

Richard Thornburg,
Attorney General of the United States of America
Main Justice Building
10th and Pennsylvania Avenues, N.W.
Washington, D.C. 20530

Beth Ann Goodwin nee Beth Ann Shurack by her attorneys Walder, Sondak, Berkeley & Brogan (appearing by James A. Plaisted) petitions upon information and belief in connection with the above referenced forfeiture as follows:

1. Petitioner lived with Joseph Anthony Brenna during the period from approximately 1981 until approximately 1987. Petitioner maintained an intimate personal relationship during that period with Brenna and he supported her and her children.

2. Mr. Brenna made a gift of the initial funds used for the down payment on the above-referenced property to the petitioner.

3. Mr. Brenna has no ownership interest or other legal interest in the above-referenced property. Mr. Brenna has not used the property in any way since 1987.

4. In and around October, 1987, Mr. Brenna vacated from the premises of the property.

5. In and around December 1987 after the petitioner was assaulted by Mr. Brenna, petitioner told Mr. Breanna [sic] not to reappear at the property.

6. The petitioner has used the house and property herein as her home and the home for her three children from 1982 up to the present date.

7. During 1988 petitioner began to pay all of the bills to maintain and improve the property without the aid of Mr. Brenna.

8. Petitioner purchased the property in her own name in 1982. The property is deeded to petitioner and petitioner alone and any mortgages are and have been solely in the petitioner's name.

9. Petitioner has always treated the property as her own and has left it in her Will for the benefit of her three children.

10. Petitioner is the sole owner of the above referenced property and has a bona fide ownership interest in the seized property.

11. Petitioner has no knowledge that the property was involved in any violation of the law or that the funds

given to her by Mr. Brenna which she used to purchase the property were traceable to drug sales. Petitioner has no knowledge that any particular violation which may have occurred subjected the property to seizure and forfeiture. Petitioner had no knowledge that Mr. Brenna had a record for violating the laws of the United States and petitioner has taken all reasonable steps to prevent the illegal use of the property.

WHEREFORE Petitioner requests that United States remit the above referenced property to her in its entirety.

WALDER, SONDAK, BERKELEY & BROGAN
Attorneys for Beth Ann Goodwin

By: /s/ James A. Plaisted
JAMES A. PLAISTED

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APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA,	Hon. HHA
Plaintiff,	Civil Action No. 89-1411
v.	
A PARCEL OF LAND, BUILDINGS, APPURTENANCES and IMPROVEMENTS Known As 92 Buena Vista Avenue Rumson, New Jersey	CONSENT ORDER (Filed July 28, 1989)
Defendant.	

THIS MATTER having been opened to the court by the United States Attorney for the District of New Jersey, Samuel A. Alito, Esq. (appearing by Neil Gallagher, Esq.) and Walder, Sondak, Berkeley & Brogan attorneys for Beth Ann Goodwin (appearing by James A. Plaisted, Esq.) and the court having reviewed the submissions of counsel and having heard the arguments of counsel with respect to the various matters raised in the telephone conference call on July 14, 1989 and for good cause shown;

IT IS ON THIS 27th DAY OF July ORDERED THAT

Claimant, Beth Ann Goodwin shall have an extension of time to answer or object to the government interrogatories until five days after the United States responds as to whether it will agree that any answers to interrogatories provided by Ms. Goodwin will not be deemed a waiver of Ms. Goodwin's privilege against self incrimination; and

IT IS FURTHER ORDERED that the deposition of Shaun Murphy will be conducted at the expense of the United States* at a reasonably convenient place in the Metropolitan area to be selected by the United States in its sole discretion prior to the end of the first week in August; however defense counsel must pay his own costs and expenses in getting to that deposition; and

IT IS FURTHER ORDERED that United States shall produce Joseph Mazocca for a deposition prior to September 30, 1989 and if he has not been produced prior to that date the United States shall show cause as to why it should not be barred from utilizing Mr. Mazocca as a witness at the trial herein; and

IT IS FURTHER ORDERED that the United States shall have been deemed to refuse to produce the interview report and statements of Mr. Mazocca taken by any government agent including but not limited to Mr. Giacobbe for the purposes of any Motions by the Claimant;

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* This provision of the aforesaid order is without prejudice to any rights the United States may have to the award of said expenses as taxable costs should it prevail in this litigation.

(1) to compel discovery, (2) for sanctions, or (3) for dismissal of the Complaint herein.

/s/ Stanley R. Chesler
Honorable Stanley R. Chesler
U.S. Magistrate
U.S. District Court
District of New Jersey

lkv
C-16

APPENDIX E

[p. 3] (Exhibits CG 1 through CG 16 marked for identification.)

RICHARD N. GIACOBBE,
being first duly sworn testified as follows:

DIRECT EXAMINATION

BY MR. PLAISTED:

Q Mr. Giacobbe, what is your present employment?

A With the Drug Enforcement Administration.

Q What is your position there?

A Special Agent.

Q How long have you been a Special Agent for the Drug Enforcement Administration?

A A little over 3 years.

* * *

[p. 70] Q What drug transaction was the 2 hundred 40 thousand dollars referred to in paragraph 5 [of the Complaint] produced by?

* * *

A Approximately at the end of 1981, 1982, beginning of 1982, Brenna organized a shipment of marijuana into the United States.

Q Where did that shipment go to?

A Into the United States.

Q Where in the United States?

A It either went to Southern Florida or the [p. 71] northeastern portion of the United States.

Q What boat was it shipped on?

A I can't recall.

Q Who manned the ship that the alleged marijuana was shipped into Southern Florida or the northeastern portion of the United States?

A I don't think the captain's name was disclosed.

I don't have my reports in front of me and we are going back to the very beginning of the years and I haven't reviewed them all recently and I can't recall the exact details pertaining to the captain and the M.O. or the importation.

Q What was the volume of the shipment of the drugs that produced these funds?

A Multi-tons of marijuana.

Q How much money did Brenna get from that shipment in 1981 or 1982?

A I have no idea now much Mr. Brenna made.

Q Where did the marijuana that you say was shipped into Southern Florida or the northeastern part of the United States come from?

A The exact location I don't know.

* * *

[p. 72] Q What date did Brenna sell this alleged shipment of marijuana?

A I have no idea when the marijuana sold.

Q What amount of money was given to him on the date of the sale?

* * *

A I have no idea how much money Mr. Brenna made or was paid to bring this marijuana into the U.S.

Q Where was the location that he was given the money for this shipment of marijuana?

A Again, I have no information pertaining to how much money Mr. Brenna was paid for it.

Q Where where [sic] did he receive it?

A I have no idea.

Q Who gave him this money for this shipment [p. 73] of marijuana?

A No idea.

Q Who was the person who gave him this marijuana that was shipped to Southern Florida or the northeastern part of the United States?

A Those individuals have not been identified at this time.

Q When Brenna allegedly received this money for this marijuana where did he put it immediately after receiving it?

A I have no idea how much money Mr. Brenna received for bringing this marijuana into the US.

* * *

[p. 75] Q So all the information that you related to us came from whom about this drug transaction?

A Drug transaction?

Q The reference in paragraph 5 of the complaint.

A Joseph Mazacco.

* * *

[p. 77] Q Who told you that Beth Ann Goodwin was a nominal party for Joseph Brenna in the purchase of Buena Vista Avenue? if anybody.

A I don't believe Beth Ann Shurack's name was specifically mentioned, just that there would be a female for the money to be wired to in New Jersey.

Q Can you tell me who, if anybody, told you that Beth Ann Goodwin was acting as a nominal party for Brenna in the purchase of Buena Vista Avenue?

MR. MERIN: In those words?

[p. 78] A At this point I can't recall which witness, who exactly said what.

Q Mr. Murphy did not tell you that Beth Ann Goodwin was a nominee for Joseph Brenna, did he?

A At the time of the investigation Beth Ann Goodwin's name was not known, she was a female living in New Jersey.

Q Mr. Murphy has never said to you that Beth Ann Goodwin was Brenna's nominee, has he?

A Those exact words, no.

* * *

Q Does Mr. Mazacco have a cooperation [p. 79] agreement with the United States?

A Yes, he does.

Q Does he make himself available to you when you need to interview him because of that cooperation agreement?

A He will make himself available if we want to interview him.

Q Can you arrange to have him produced for a depostion [sic]?

MR. MERIN: Yes.

* * *

[p. 81] Did Ms. Goodwin supply you with information that you forwarded to the prosecutors in the Brenna case when you took her statement?

A This statement?

Q Yes.

A It is available to the prosecutors in Southern Florida.

* * *

[p. 97] Q As far as you could tell he had nothing to do with any boat business?

A Legal business, no, sir.

Q Did he [Brenna] have any business with boats?

A Yes, sir.

Q When you say illegal business with boats, did he repair boats illegally?

A No.

Q Did he buy and or sell boats illegally?

A In the furtherance of a narcotic organization, yes, sir.

Q So you did have evidence that he bought and sold boats?

A Yes, sir.

Q How many?

A I don't recall, sir.

* * *

Q Do you recall that name?

[p. 98] A Yes.

Q What is it?

A A sail vessel.

Q Did Brenna have an interest in it?

A Yes.

Q Did he buy it?

A He was part of the purchase of it.

Q Did he own a boat in New Jersey?

A I believe he owned several, sir.

Q Did he sell some of them?

A When, can you be specific with years?

Q I don't know facts, I am asking you based on your interview with Goodwin.

MR. MERIN: Based on the transcript?

MR. PLAISTED: Yes.

A Before the interview of Ms. Goodwin I don't believe he sold them.

Whether he has now sold boats I don't know.

Q How many did he own at the time of the interview with Ms. Goodwin?

A I believe he owned a few of them, sir.

Q When you say a few, approximately how many?

MR. MERIN: If you know.

[p. 99] A Approximately 3.

Q What were the names of those boats?

A The Saharra, the sail vessel Caliby, the sail vessel Capricorn, and the motor vessel Apache Chief, and other vessels he has used in the importation of marijuana.

* * *

[p. 108] Q And Lois Geiling didn't tell you that she was a nominee or nominal party?

A Again, sir, no one directly said that Beth Ann Shurack was a nominee.

* * *

Q I take it Mr. Mazacco did not say she was [p. 109] a nominee for Mr. Brenna either?

A Nobody has told me, nobody.

* * *

[p. 114] A I don't believe Mr. Murphy had any personal knowledge of what Mr. Brenna did for a living.

Q In fact he said that in the trial transcript, didn't he?

A If that's what you are saying.

Q I am asking you, did he say, "I don't have any personal knowledge of what Brenna did for a living"; did he ever say that to you?

A To me, yes.

* * *

[p. 115] Q Did Murphy ever say anything about the 2 hundred 16 thousand coming from drugs?

A No.

Q In fact he said he didn't know, correct?

A Did not know what Mr. Brenna did for a living.

Q Correct. And he said he didn't know whether or not the money came from drugs?

A Correct, sir.

Q And the only one who has provided a factual basis to you for paragraph 12 is Mazacco, correct?

A Yes, sir.

Q In paragraph 13, could you set forth the full factual basis for your statement that Beth Ann

[p. 116] Goodwin as a nominee or nominal party for Brenna kept up the property at 92 Buena Vista Avenue?

A Beth Ann Shurack's transcript.

Q Right.

A Her transcript.

Q Okay.

Can you set forth the full factual basis for your statement in paragraph 14 that Brenna obtained the 2 hundred 25 thousand dollars used to maintain the property from drug transactions?

A Mazacco.

* * *

[p. 134] You and Agent Lohr knew before May 5, 1980, when you went to interview Ms. Goodwin that money had come from Brenna via wire transfer that was ultimately used to purchase 92 Buena Vista, correct?

A Yes.

* * *

[p. 135] Q Does Mr. Mazacco have any drug involvement known to you that are related to transactions that are not controlled by Mr. Brenna?

A The answer to that is, yes, I believe he does.

Q Has the Government foregone prosecution against him for those other transactions to gain his cooperation?

A My answer to that is it is the same organization.

Q Is one of the cases Mr. Mazacco is cooperating in this seizure action?

[p. 136] A Yes.

Q Has Mr. Mazacco received remuneration from the government in the form of money?

A No.

Q Has Mr. Mazacco received any benefits from the government of a monetary nature?

A No.

Q How many times has Mr. Mazacco violated the drug laws in so far as you know?

A Less than 10 times.

Q How many years has he been involved in drug transactions, as far as you know?

A Approximately the past –

MR. GALLAGHER: Pardon me.

(Discussion off the record between the witness and government counsel.)

(Record read.)

A A few years total.

Q When you say a few years, he started at least as early as 1982, correct?

A Yes.

Q Was he involved before 1982?

A Approximately 1981.

Q Was he involved before 1981?

A Not that I know of.

[p. 137] Q From 1981 until what point did he continue to be involved in drug transactions?

A Drug transactions, I believe sometime in the beginning of 1987.

Q And have you seized any of Mr. Mazacco's assets?

(Discussion off the record between government counsel and the witness.)

A No.

Q Between the years 1982 and 1987 did Mr. Mazacco have any employment on a regular basis that was legal?

A I think he did, sir.

Q What was it?

A To the best of my recollection, I believe it was something to do with chartering in Southern Florida, boats.

Q Was he in the boat business?

A What is your definition of "boat business"?

Q Was he chartering in the boat business?

A Yes.

Q Did you have any information which indicated that Mr. Brenna may have chartered boats from time to time, chartered out boats that he owned?

A No.

[p. 138] Q Did you have any information indicating that he did not charter out boats that he owned?

A No.

Q Wouldn't you agree that it is a fair assumption that if you own a number of boats as you have identified Mr. Brenna as owning that you may well charter them out from time to time if you can't use them all at once?

MR. MERIN: Objection, argumentative. I instruct the witness not to answer.

Q Did you ever make inquiry to determine whether Mr. Brenna chartered out boats?

A Inquiries must have been made, sir.

Q But you did not?

A I believe I did.

Q Whom did you inquire of?

A Probably there was no one to inquire to.

Q So then I take it you didn't, you were not actually able to make any such inquiries as to whether he chartered out boats because you couldn't find anybody to ask?

A Correct.

Can we, can you go back a couple of questions? I want to make sure I answered them correctly.

(Record read.)

[p. 139] A Pertaining to chartering boats, that Mr. Brenna may have chartered out boats –

Q May have chartered out his boats?

A Chartered out his boats?

Q Yes.

A There is information that Mr. Brenna had chartered out a vessel; whether he owned it, his organization owned it, a corporation owned it, is not determined at this time.

(Exhibit CG 19 marked for identification.)

* * *

Q Did Mazacco provide you any documents that [p. 140] showed that that money given by Brenna to Murphy was drug money?

A Mazacco was not present when the money was given to Shaun Murphy; ask Shaun Murphy.

Q My question to you is, did Mazacco give you any documents that showed that the source of the money that Brenna gave Murphy that was transferred to Davis was drug money?

A No.

Q Did Mazacco give you any other physical evidence that shows that the money that Brenna later gave to Murphy out of Mazacco's presence was drug money?

A No.

Q Did you ever ask Mazacco if he knew where the money Brenna gave Murphy in October of 1982 came from?

MR. GALLAGHER: Objection.

MR. PLAISTED: Goes to this witness' affidavit.

MR. GALLAGHER: You are asking him what he asked Mr. Mazacco?

MR. PLAISTED: Right.

MR. GALLAGHER: I am going to direct him not to answer; that's work product.

[p. 141] Q Does Mazacco know the source of all money Brenna had in 1982?

A No.

Q Did Mazacco and Brenna live together in 1982?

A Not that I know of.

Q Did they have daily contact in 1982?

A I don't no, sir.

Q Did Mazacco live in the same town Brenna did in 1982?

MR. MERIN: All year?

A I don't recall if Mazacco lived in Rumson, New Jersey, or the lower portion of New Jersey.

Q Does Mazacco claim to know the details of all of Brenna's finances?

A No.

Q Was Mazacco's only contact with Brenna the single alleged drug transaction that you have previously identified in 1981 and 1982?

MR. GALLAGHER: Objection.

MR. PLAISTED: We may be able to get our motion done without other depositions if we get through this.

MR. GALLAGHER: I don't think I am going to allow him to answer as to the scope of what Mazacco [p. 142] told him.

Mazacco is available; you can take his deposition.

MR. PLAISTED: Don't you think it would be easier to have full discovery now and make our record, rather than fudging around?

MR. MERIN: We are not fudging around. What you are proposing puts us in the position of where someone on the basis of information gathered in preparation for litigation, using that information in essence –

MR. PLAISTED: This man filed the affidavit.

MR. MERIN: That would be speculating as to what Mazacco may have said.

Q Can you set forth in full for me the facts that show that the 2 hundred 25 thousand given by Brenna to Murphy was proceeds of a drug transaction?

A Mazacco.

* * *

[p. 143] Q What I am asking you is, in the complaint that you swore to, you allege that the 2 hundred 25 thousand was traceable to a drug transaction.

Can you tell me in full the facts that support that?

MR. GALLAGHER: He just did, asked and answered.

A You have been told to see Mazacco.

* * *

[p. 145] Q Do you agree Mazacco wasn't present in the Virgin Islands, correct, when Brenna gave money to Murphy, correct?

A You are going to have to go through that again.

Q Was Mazacco present in the Virgin Islands [p. 146] when Brenna gave Murphy money?

A When?

Q 1982.

A Not that I know of.

Q Did Mazacco accompany Brenna to the Virgin Islands in or around 1982?

A For what reason?

Q For any reason.

A Not that I know of.

* * *

Q Does Mazacco have any way of knowing the actual source of the precise 2 hundred 25 thousand dollars that Brenna allegedly gave Murphy in 1982?

[p. 147] A Sir, I have no idea of what Mazacco has knowledge of pertaining to that.

Q Didn't you interview him about that precise fact before you signed your affidavit?

A Pertaining to the 2 hundred 14?

Q Did you ever interview him at all as to whether or not the money given to Murphy by Brenna was known to Mazacco to be drug money?

A Mazacco didn't have have knowledge of the money being transferred offshore to Mr. Murphy, that I know.

* * *

APPENDIX F

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

UNITED STATES OF AMERICA
Plaintiff,

v.

JOSEPH C. MAIORINO,
a/k/a Joe from Anguilla,
JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,
a/k/a Joseph Crawford,
ROBERT J. KENNEDY,
a/k/a Bob, and
JAMES H. BRENNA,
a/k/a Jimmy,

Defendants.
_____/

Case No.
90-6055-CR-
GONZALEZ(S)

18 U.S.C. 2
21 U.S.C. 848
21 U.S.C. 853
21 U.S.C. 952(a)
21 U.S.C. 963

INDICTMENT

The Grand Jury charges that:

COUNT I

From on or about January 1, 1982 to in or about December 1988, in the Southern District of Florida and elsewhere, defendant

JOSEPH C. MAIORINO
a/k/a Joe from Anguilla,

knowingly and intentionally engaged in a continuing criminal enterprise, in that he knowingly and intentionally violated Title 21, United States Code, Sections

952(a) and 963, as described in Counts III through VII of this indictment, which counts are incorporated herein by reference, which violations of subchapters I and II of the Drug Abuse and Control Act of 1970 undertaken by defendant JOSEPH C. MAIORINO in concert with at least five other persons with respect to whom defendant JOSEPH C. MAIORINO occupied a position of organizer, supervisor, and manager, and from which continuing series of violations defendant JOSEPH C. MAIORINO obtained substantial income and resources.

All in violation of Title 21, United States Code, Section 848.

Forfeiture

Upon conviction of defendant JOSEPH C. MAIORINO of engaging in a Continuing Criminal Enterprise, as set forth in this Count (Count I), in violation of Title 21, United States Code, Sections 848 and 853, the United States is entitled to forfeiture of, and the defendant will forfeit to the United States, all profits and property constituting, or derived from, any proceeds obtained directly or indirectly by him in such enterprise, and shall forfeit his interest in, or claim against, any and all property and contractual rights of any kind affording a source of influence over such property; as was used by him to facilitate such enterprise or was obtained with the profits or proceeds of profits of such enterprise, including, but not limited to, the following:

Cash in the amount of $24,000,000 received as proceeds of narcotics trafficking.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT II

From on or about January 1, 1982 to in or about December 1988, in the Southern District of Florida and elsewhere, defendant

JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh
a/k/a Joseph Crawford,

knowingly and intentionally engaged in a continuing criminal enterprise, in that he knowingly and intentionally violated Title 21, United States Code, Sections 952(a) and 963, as described in Counts III through VII of this indictment, which counts are incorporated herein by references, which violations were part of a continuing series of violations of subchapters I and II of the Drug Abuse and Control Act of 1970 undertaken by defendant JOSEPH A. BRENNA in concert with at least five other persons with respect to whom defendant JOSEPH A. BRENNA occupied a position of organizer, supervisor, and manager, and from which continuing series of violations defendant JOSEPH A. BRENNA obtained substantial income and resources.

All in violation of Title 21, United States Code, Section 848.

Forfeiture

Upon conviction of defendant JOSEPH A. BRENNA of engaging in a Continuing Criminal Enterprise, as set

forth in this Count (Count II), in violation of Title 21, United States Code, Sections 848 and 853, the United States is entitled to forfeiture of, and the defendant will forfeit to the United States, all profits and property constituting, or derived from, any proceeds obtained directly or indirectly by him in such enterprise, and shall forfeit his interest in, or claim against, any and all property and contractual rights of any kind affording a source of influence over such property; as was used by him to facilitate such enterprise or was obtained with the profits or proceeds of profits of such enterprise, including, but not limited to, the following:

A. Cash in the amount of $24,000,000 received as proceeds of narcotics trafficking.

B. Certain real property known and numbered as 92 Buena Vista Ave., Rumson, New Jersey and described as

> Municipality of Rumson, Block No. 114, Lot No. 13 property. The property consists of the land and all the buildings and structures on the land in the Borough of Rumson County of Monmouth and State of New Jersey. The legal description is:
>
> BEGINNING at a monument standing in the westerly side of Buena Vista Avenue distant 2420.35 feet measured in a southerly direction from the intersection formed by the westerly side of Buena Vista Avenue and the southerly side of Rumson Road, and running thence
>
> 1. South 26 degrees 23 minutes east 200.15 feet along the westerly side of Buena Vista Avenue to a point therein; thence
>
> 2. South 65 degrees 51 minutes 30 seconds west 409.00 feet to a point; thence

3. North 24 degrees 08 minutes 30 seconds west 160.00 feet to a point; thence

4. North 65 degrees 51 minutes 30 seconds east 180.00 feet to a point; thence

5. North 21 degrees 41 minutes 30 seconds east 57.39 feet to a point; thence

6. North 65 degrees 51 minutes 30 seconds east 180.00 feet to the point and place of beginning.

C. A certain marine vessel known as the "Sahara" and described as a 60-foot wooden hulled Stowington marine vessel.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT III

From on or about January 1, 1982 and continuing thereafter to in or about December 1988, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO,
a/k/a Joe from Anguilla,
JOSEPH A BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,
a/k/a Joseph Crawford,
ROBERT J. KENNEDY,
a/k/a Bob, and
JAMES H. BRENNA,
a/k/a Jimmy,

knowingly and intentionally combined, conspired, confederated and agreed with each other and with persons known and unknown to the Grand Jury to commit

offenses against the United States, that is to violate Title 21, United States Code, Section 952(a).

It was the purpose and object of this conspiracy to knowingly and intentionally import into the United States, from a place outside thereof, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 963.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT IV

In or about April 1985, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO,
a/k/a Joe from Anguilla,
JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,
a/k/a Joseph Crawford, and
ROBERT J. KENNEDY,
a/k/a Bob,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT VI

In or about October 1986, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO,
a/k/a Joe from Anguilla,
JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,
a/k/a Joseph Crawford, and
JAMES H. BRENNA,
a/k/a Jimmy,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

THE GRAND JURY FURTHER CHARGES THAT:

COUNT VII

In or about November 1986, in the Southern District of Florida and elsewhere, defendants

JOSEPH C. MAIORINO,
a/k/a Joe from Anguilla,
JOSEPH A. BRENNA,
a/k/a Little Joe,
a/k/a Joseph Cavanaugh,

a/k/a Joseph Crawford, and
JAMES H. BRENNA
a/k/a Jimmy,

knowingly and intentionally imported into the United States, from a place outside thereof, and knowingly and intentionally aided and abetted such importation of, a Schedule I controlled substance, that is, a quantity of marijuana in excess of 1,000 kilograms.

All in violation of Title 21, United States Code, Section 952(a), and Title 18, United States Code, Section 2.

A TRUE BILL

/s/ Michael D. Marcus
FOREPERSON

/s/ Dexter W. Lehtinen (JW)
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA

Certified to be a true and
correct copy of the original

Robert M. March, Clerk
U.S. District Court
Southern District of Florida

By /s/ (illegible)
Deputy Clerk

Date APR 13 1990

Supreme Court, U.S.
FILED
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No. 91-1052

In the Supreme Court of the United States

OCTOBER TERM, 1991

BETH ANN GOODWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether there was sufficient evidence, apart from petitioner's immunized testimony, to establish probable cause to believe that the property at issue in this forfeiture action was purchased with proceeds of illegal drug transactions.

2. Whether forfeiture proceedings under 21 U.S.C. 881, which are conducted in accordance with "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws," are subject to the statute of limitations for forfeitures under the customs laws, 19 U.S.C. 1621.

3. Whether this forfeiture proceeding is subject to dismissal on the ground that the government unduly delayed the filing of the action.

4. Whether, in view of the lower courts' determination that there is probable cause to believe that the real estate at issue is subject to forfeiture, petitioner is entitled to dismissal of this forfeiture proceeding on the ground that she did not receive a hearing before the property was seized.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (91-781 Pet. App. 1a-16a) is reported at 937 F.2d 98.[1] The opinions of the district court denying respondent Goodwin's motion for summary judgment (91-781 Pet. App. 17a-35a) and certifying certain questions for interlocutory appeal (91-781 Pet. App. 38a-45a) are reported, respectively, at 738 F. Supp. 854 and 742 F. Supp. 189.

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[1] The instant petition is a cross-petition filed in response to our petition in No. 91-781. Citations to "91-781 Pet. App." are to the appendix to that petition. Citations to "Cross-Pet. App." are to the appendix to the cross-petition.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1991. A petition for rehearing was denied on August 13, 1991 (91-781 Pet. App. 46a-47a). The petition for a writ of certiorari in No. 91-781 was filed on November 12, 1991 (a Tuesday after a Monday holiday), and was received by petitioner on November 15, 1991. This cross-petition was filed on December 16, 1991 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The facts of this case are set forth in detail in our petition in No. 91-781. Briefly, the government seeks forfeiture of real estate in Rumson, New Jersey, under 21 U.S.C. 881(a)(6). The government alleged —and both lower courts found probable cause to believe—that the property was purchased with funds that petitioner's companion, Joseph Brenna, derived from illegal drug transactions. Based upon the government's verified complaint, the district court issued a warrant authorizing the seizure of the property. Notwithstanding the seizure, petitioner has remained in possession of the property pursuant to an occupancy/tenant agreement with the Marshals Service. C.A. App. 54a-55a, 656a-663a.

In the district court, petitioner filed motions to dismiss and for summary judgment. Petitioner contended (1) that she was an "innocent owner" of the property within the meaning of Section 881(a)(6); (2) that the seizure of the property was unlawful because it had not been preceded by notice and a hearing; (3) that the forfeiture complaint was based on testimony that petitioner had given under a grant of use immunity; and (4) that the action was barred

by the applicable statute of limitations (in petitioner's view, 28 U.S.C. 2462) or by undue delay.

The district court denied the motions. 91-781 Pet. App. 17a-35a. The court's disposition of petitioner's first contention, which is the subject of our petition in No. 91-781, is described in that petition. The district court found it unnecessary to determine whether the Due Process Clause requires a hearing before real property is seized. The court noted that "[v]arious circuit courts have held that the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." *Id.* at 19a. Consequently, the court continued, an unconstitutional seizure "provides no basis for dismissing an action where the government demonstrates entitlement to forfeiture based upon permissible evidence." *Ibid.* In this case, it found, "the government has established, by permissible evidence, that probable cause exists to subject the premises to forfeiture." *Id.* at 20a. See 91-781 Pet. 4-6 (summarizing the evidence underlying that determination).

The district court rejected, on similar grounds, petitioner's contention that the forfeiture complaint was improperly based on her immunized testimony. The court concluded that "[t]he government has adequately demonstrated, from other sources independent of [petitioner's] testimony, that probable cause exists to support forfeiture of the premises." 91-781 Pet. App. 30a.

The court found that any delay between the criminal acts underlying the forfeiture and the institution of forfeiture proceedings did not warrant dismissal of the action. The court acknowledged that "[d]ue process concerns are implicated where there is a delay

between the seizure of the property and the post-seizure filing of a judicial forfeiture action." 91-781 Pet. App. 31a. But in this case, it continued, "there has been no real deprivation * * *, because [petitioner] has been permitted to continue to reside at the premises under an arrangement with the government," and petitioner "was afforded the opportunity to contest the forfeiture and engage in discovery shortly after the seizure." *Id.* at 32a. The court also concluded that the action had been commenced within the period prescribed by 19 U.S.C. 1621, rejecting petitioner's contention that 28 U.S.C. 2462 governs forfeiture proceedings under 21 U.S.C. 881.[2]

The district court certified four questions for interlocutory appeal pursuant to 28 U.S.C. 1292. The questions relevant to the cross-petition were (91-781 Pet. App. 44a-45a):

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[2] Section 881(d) provides that "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter, insofar as applicable and not inconsistent with the provisions hereof." The statute of limitations for forfeiture proceedings under the customs laws, 19 U.S.C. 1621, provides that such a proceeding must be commenced "within five years after the time when the alleged offense was discovered."

Petitioner advocated application of the residual statute of limitations set forth in 28 U.S.C. 2462. Section 2462 provides that "[e]xcept as otherwise provided by Act of Congress," an action for "the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise," must be commenced "within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon."

> (1) Whether the seizure of [petitioner's] home was unconstitutional because there was no pre-seizure hearing and, if so, whether the forfeiture proceedings involving said home should be dismissed as a result; * * *
>
> (3) Whether the verified complaint in this action was based, in part, upon immunized testimony and if so, whether the forfeiture proceedings must be dismissed as a result; and
>
> (4) Whether the government's claims in this action are barred by the applicable statute of limitations and/or undue delay.

2. The court of appeals affirmed on the questions at issue on the cross-petition. The court found that the absence of pre-seizure notice and a hearing could not justify dismissal of the action. Although the initial "seizure of [petitioner's] home * * * may have been unlawful," the court explained, "the unlawfulness of the seizure does not require dismissal of the forfeiture proceedings provided that probable cause to seize the premises can be supported by untainted evidence." 91-781 Pet. App. 5a. The panel upheld the district court's determination that the government had made the requisite showing in this case. *Id.* at 6a.

The court of appeals also rejected petitioner's contention that use of her immunized testimony required dismissal of the action. The court noted that the DEA agent who had verified the forfeiture complaint "relied * * *, in part," on testimony petitioner had given under a grant of use immunity, and it "assume[d], without deciding, that a civil forfeiture effected under section 881 constitutes a 'criminal case' under the immunity statute, 18 U.S.C. § 6002." 91-781 Pet. App. 10a & n.3. Nevertheless, the court of appeals continued, "[b]ased upon the informa-

tion cited by the district court which was garnered independently of [petitioner's] testimony, the district court correctly concluded that probable cause existed for the forfeiture of the property." *Id.* at 14a.

Finally, the court of appeals held that the action was not barred by the statute of limitations or by undue delay. Relying upon 21 U.S.C. 881(d), which makes statutory provisions relating to forfeitures under the customs laws applicable to proceedings under Section 881, the court found that the applicable statute of limitations is 19 U.S.C. 1621. See note 2, *supra*. Section 1621 requires that an action for a forfeiture be commenced "within five years after the time when the alleged offense was discovered." The court of appeals concluded that "because the government became aware of the transactions giving rise to this action in 1986 and because the government instituted this forfeiture action within five years (1989), the statute of limitations does not bar this action." 91-781 Pet. App. 15a. The court found no support for petitioner's contention that undue delay in the filing of a forfeiture action preceding a seizure—as opposed to delay between a seizure and a subsequent forfeiture action—warrants dismissal of the action. Like the district court, the panel concluded that petitioner was "permitted to be heard 'at a meaningful time after the deprivation of the property' " and was not "wholly deprived of her property since she has been permitted to continue to reside at the premises." *Id.* at 15a-16a.[3]

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[3] The court also held that petitioner could assert an innocent owner defense and remanded for further proceedings to determine if petitioner was in fact an innocent owner. 91-781 Pet. App. 6a-9a. Our petition in No. 91-781 seeks further review of that issue.

ARGUMENT

Petitioner does not dispute our showing that the question presented by our petition in No. 91-781—whether a person may assert the innocent owner defense recognized by 21 U.S.C. 881(a)(6) on the basis of an interest in property that has been acquired only after title to the property has vested in the United States—is worthy of further review. The issues raised by the cross-petition, by contrast, do not call for this Court's attention. As both lower courts recognized, it is unnecessary to reach two of those issues—whether the Fifth Amendment prohibits the use of immunized testimony in a civil forfeiture proceeding and whether real property may be seized without a prior hearing. There is no conflict among the circuits or any other consideration supporting further review of petitioner's claims that the action was commenced after the expiration of the statute of limitations or was unduly delayed. Finally, contrary to petitioner's contention, the issues raised by the cross-petition are not intertwined with the question presented by our petition. We submit, accordingly, that the petition in No. 91-781 should be granted and that the cross-petition should be denied.

1. Petitioner contends that this action should be dismissed because the government has relied on immunized testimony in pursuing this action. Pet. 8-10. The court of appeals assumed for purposes of argument that the Fifth Amendment privilege against compelled self-incrimination was applicable to this proceeding, but held that there was sufficient evidence, apart from petitioner's testimony, to establish probable cause. 91-781 Pet. App. 10a-14a & n.3. That conclusion was fully justified, and it does not warrant further review in this Court.

The Fifth Amendment protects against compelled self-incrimination "in any criminal case." In *Boyd* v. *United States*, 116 U.S. 616, 634 (1886), this Court stated that, for purposes of the Fifth Amendment privilege, "proceedings instituted for the purpose of declaring the forfeiture of a man's property by reason of offences committed by him, though they may be civil in form, are in their nature criminal." [4] "Several of *Boyd*'s express or implicit declarations have not stood the test of time," *Fisher* v. *United States*, 425 U.S. 391, 407 (1976), and this Court has cautioned against giving them "full scope," *United States* v. *Ward*, 448 U.S. 242, 253 (1980).

Whether or not the Fifth Amendment privilege is available to petitioner in this proceeding, however, both lower courts found that evidence derived from sources independent of petitioner's immunized testimony is sufficient to establish probable cause to believe that the property in question was purchased with drug proceeds. 91-781 Pet. App. 14a, 30a. Thus, both held, any reliance that the government may have placed on immunized testimony would not justify dismissal of the action. This determination, which rests on a factual finding concurred in by both lower courts, presents no question calling for this Court's review. See, *e.g.*, *United States* v. *Doe*, 465 U.S. 605, 614 (1984); *Graver Tank & Mfg. Co.* v. *Linde Air Products Co.*, 336 U.S. 271, 275 (1949).

There is no merit to petitioner's attack on the lower courts' dispositive factual finding. Her only

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[4] See also *United States* v. *United States Coin & Currency*, 401 U.S. 715, 718 (1971); *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965); *United States* v. *Riverbend Farms, Inc.*, 847 F.2d 553, 559 (9th Cir. 1988); *In re Grand Jury Proceedings*, 835 F.2d 375 (1st Cir. 1987); *In re Grand Jury Investigation*, 657 F.2d 88, 91 (6th Cir. 1981).

specific contention is that her "admission that she received money from Brenna provided circumstantial evidence presumably utilized to further the investigation that led to the Brenna indictment" and that reliance on the indictment in this case thus violated her privilege against self-incrimination. Pet. 9 & n.2. Before petitioner gave her testimony under immunity, however, the government had already learned of the source of the funds used to buy the house from Shaun Murphy (the Virgin Islands accountant who actually wired the money to New Jersey). See 91-781 Pet. 5-6; Gov't C.A. Br. 7. Petitioner's own filings in this case, which are not covered by any grant of immunity, assert that "Mr. Brenna made a gift of the initial funds used for the down payment on the * * * property to [petitioner]." Cross-Pet. App. 15a. Thus, it is unnecessary to rely on petitioner's immunized testimony to establish the source of the funds used to buy the property at issue. There is no dispute that petitioner's testimony provided no information regarding Brenna's drug transactions. Thus, the use of the indictment to establish probable cause to believe that his funds were derived from drug dealing entails no possible misuse of immunized testimony.

2. Petitioner contends (Pet. 11-13) that this action is subject to the residual statute of limitations set forth in 28 U.S.C. 2462, rather than the statute prescribed for forfeitures under the customs laws, 19 U.S.C. 1621, and that the action was filed outside the period prescribed by the former statute.

To our knowledge, this is the first case to decide which statute of limitations is applicable to forfeitures under 21 U.S.C. 881. As the court of appeals held, the plain language of Section 881(d) compels the conclusion that 19 U.S.C. 1621 applies. Section

881(d) states that "[t]he provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws * * * shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under any of the provisions of this subchapter [21 U.S.C. 801-904] * * *." The statute of limitations for customs forfeitures, 19 U.S.C. 1621, is plainly a "provision[] of law relating to the * * * judicial forfeiture, and condemnation of property for violation of the customs laws."

Petitioner's argument is based on the notion that each word or phrase in Section 881(d) corresponds to a discrete provision of the customs laws and that Section 1621 is not among the referenced provisions.[5] Neither the text nor the legislative history provides any support for that view.[6] Nor does petitioner ex-

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[5] The bracketed citations in petitioner's quotation of Section 881(d) are petitioner's invention; nothing comparable appears in the statute itself. See Pet. 11-12.

[6] As the result of a 1979 amendment to the statute, Section 881(d) does not incorporate provisions of the customs laws providing for payments to informants. See 19 U.S.C. 1619. Contrary to petitioner's contention (Pet. 12), however, that exception to Section 881(d) has no bearing on the applicable statute of limitations.

Prior to the 1979 amendment, Section 881(d) incorporated "[a]ll provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims *and the award of compensation to informers in respect of such forfeitures* * * *." 21 U.S.C. 881(d) (1976) (emphasis added). The amendment changed "[a]ll provisions" to "[t]he provisions" and deleted the highlighted phrase. The obvious intention of the amendment, confirmed by its legislative history

plain why, if Congress intended only to incorporate selectively from the customs laws, it failed to make that intention clear by means of specific citations to those provisions it wished to borrow. Section 881(d)'s broad, inclusive language fully justifies the lower court's conclusion that Congress intended no such limitation on the applicability of the customs laws to forfeitures under Section 881.[7]

By its terms, 28 U.S.C. 2462 applies only when Congress has not supplied a statute of limitations for a particular class of cases—*i.e.*, "[e]xcept as otherwise provided by Act of Congress." Moreover, even if this statute were applicable to forfeitures under Section 881, it would produce the same result as 19 U.S.C. 1621.[8] Petitioner's contention that this case

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(see S. Rep. No. 173, 96th Cong., 1st Sess. 36-37 (1979)), was to render inapplicable the provision of the customs laws providing for payments to informers, 19 U.S.C. 1619. The amendment did not affect Section 881(d)'s incorporation of the customs laws' statute of limitations; both before and after that change, Section 881(d) was plainly broad enough to encompass 19 U.S.C. 1621.

[7] The language of Section 881(d) is no less inclusive than that of 46 U.S.C. App. 836, the statute at issue in *The Brazil*, 134 F.2d 929 (7th Cir. 1943). Section 836 provides that forfeitures under the Shipping Act "may be prosecuted in the same court, and may be disposed of in the same manner, as forfeitures incurred for offenses against the law relating to the collection of duties." *The Brazil* held that this language incorporated Section 1621, the statute of limitations at issue here.

[8] See 1 D. Smith, *Prosecution and Defense of Forfeiture Cases* ¶ 12.02, at 12-47 to 12-48 (1991). The five-year period prescribed by Section 2462 begins to run, with an exception not relevant here, on "the date when the claim first accrued"; as Smith notes, "[t]he general rule for the accrual of federal claims is that 'the statute of limitations begins to run when a plaintiff knows or should know' " of the facts giving rise to

was filed beyond the period of limitations does not warrant further review.

3. As noted, the property at issue was seized, pursuant to a warrant issued by the district court upon a finding of probable cause, after this action was filed. C.A. App. 67a-71a. Petitioner contends that the delay—which she characterizes as "undue"— between the time that the government had information supporting a forfeiture and the commencement of this action warrants dismissal of this action. Pet. 13-17. The lower courts correctly rejected that contention, and none of the authorities on which petitioner relies supports her position.

In *United States* v. *Pappas*, 613 F.2d 324, 330 (1979) (en banc), the First Circuit held that 21 U.S.C. 881(b)(4) authorized a *warrantless* seizure of property "only when the seizure immediately follows the occurrence that gives the federal agents probable cause to believe that the [property] is subject to forfeiture under section 881(a) *and* the exigencies of the surrounding circumstances make the requirement of obtaining process unreasonable or unnecessary." That interpretation of Section 881(b)(4), which other courts have rejected,[9] is inapposite to this

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the claim. *Ibid.*; cf. *United States* v. *Kubrick*, 444 U.S. 111 (1979) (cause of action for medical malpractice under the Federal Tort Claims Act accrues when the plaintiff was aware of his injury and its cause). That standard is substantially the same as the standard prescribed by 19 U.S.C. 1621, which allows five years "after the time when the alleged offense was discovered."

[9] See *United States* v. *Valdes*, 876 F.2d 1554, 1557-1558 & nn.8-9 (11th Cir. 1989); *United States* v. *One 1978 Mercedes Benz*, 711 F.2d 1297, 1302 (5th Cir. 1983); *United States* v. *Kemp*, 690 F.2d 397, 402 (4th Cir. 1982); *United States* v.

case. Here, the government did not rely on Section 881(b)(4); it obtained a warrant.[10] As the First Circuit has made clear, nothing in *Pappas* suggests that the government must initiate a forfeiture action or seek a warrant within some period after it obtains probable cause to believe that property is subject to forfeiture.[11]

The remaining authorities on which petitioner relies are just as far afield. *Sgro* v. *United States*, 287 U.S. 206 (1932), and *United States* v. *Neal*, 500 F.2d 305 (10th Cir. 1974), involved claims that the information used to procure search warrants had become stale—*i.e.*, that the facts used to show probable cause could have changed during the period prior

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Bush, 647 F.2d 357, 368-369 (3d Cir. 1981); *United States* v. *One 1977 Lincoln Mark V. Coupe*, 643 F.2d 154, 157-158 (3d Cir.), cert. denied, 454 U.S. 818 (1981). See also *United States* v. *Spetz*, 721 F.2d 1457, 1469-1470 (9th Cir. 1983). The First Circuit itself has recognized that *Pappas* "has been considerably beleaguered" and might be subject to reconsideration. *In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d 307, 311 n.4 (1988).

[10] Section 881(b) authorizes the government to seize property subject to forfeiture in five different ways: (1) upon process issued by a district court, following commencement of a forfeiture action against the property; (2) pursuant to an arrest or a search authorized by a warrant; (3) pursuant to a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding; (4) without a warrant, upon a showing of probable cause to believe that the property is dangerous to public health or safety; and (5) without a warrant, upon a showing of probable cause that the property is subject to civil forfeiture. *Pappas* involved the last of these alternatives; in this case, the government obtained a warrant following the institution of a forfeiture action.

[11] See *In re Application for Warrant to Seize One 1988 Chevrolet Monte Carlo*, 861 F.2d at 311-312.

to the issuance of a warrant. The seizure of the property at issue here is subject to no similar objection. The essence of the government's claim is that the property was purchased with proceeds of narcotics transactions. A showing of probable cause to that effect, unlike a showing that evidence of a crime will be found at a particular place, does not lose any of its force with the passage of time.

In *United States* v. *Eight Thousand Eight Hundred and Fifty Dollars ($8,850) in United States Currency*, 461 U.S. 555 (1983), this Court rejected a contention that the government had violated the requirement of due process by delaying judicial forfeiture proceedings, but made clear that such claims should be determined with reference to the same factors used to decide whether criminal defendants have received the speedy trial guaranteed by the Sixth Amendment. In this case, judicial forfeiture proceedings were commenced *before* any seizure occurred. By the time petitioner was deprived of any interest in her property, there was a pending judicial proceeding in which she was able to obtain an adversary ruling on the existence of probable cause to support the seizure. There is no conflict between the court of appeals' decision here and *$8,850 in United States Currency*, nor is there any other consideration supporting this Court's review.

4. Finally, petitioner seeks further review of her contention that the Due Process Clause requires a hearing before a home is seized for civil forfeiture. Pet. 17-20. Although the courts of appeals have expressed differing conclusions with regard to this question, all agree that any defect in the procedure by which property is seized does not immunize the property from forfeiture. In this case, both lower courts

have determined that there is probable cause to believe that the relevant property was purchased with drug proceeds. Thus, whether or not petitioner should have received a hearing prior to the seizure of the house, she is not now entitled to any relief in this action.

In *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679-680 (1974), this Court held that the Due Process Clause did not require notice and a hearing before a yacht on which marijuana was discovered was seized for forfeiture. The Court cited three considerations justifying postponement of notice and hearing: (1) the fact that seizure served important governmental purposes, allowing courts to assert *in rem* jurisdiction over the property and thereby to enforce the drug statutes, (2) the fact that the yacht might otherwise be moved to another jurisdiction or concealed, and (3) the fact that the seizure was effected by governmental authorities, rather than self-interested private parties.

In *United States* v. *A Single Family Residence*, 803 F.2d 625, 632 (1986), the Eleventh Circuit held that the reasoning of *Calero-Toledo* could fairly be extended to real property even though it is less movable than personal property. By contrast, the Second Circuit has ruled that the magnitude of a claimant's interest in a house and the absence of exigent circumstances in typical seizures of real property alter the balance of interests material to the requirement of procedural due process and mandate a pre-seizure hearing. *United States* v. *The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1262-1266 (1989).[12] In this case, the court of appeals

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[12] The Supreme Court of Florida has reached a similar conclusion with respect to that State's forfeiture statute. *Depart-*

observed in dicta that "[i]n keeping with the analysis used in *South Livonia*, * * * the government's seizure of [petitioner's] home pursuant to section 881 without notice and a hearing may have been unlawful." 91-871 Pet. App. 5a.

Whatever the merits of *South Livonia*'s constitutional analysis may be, it is clear that the absence of a pre-seizure hearing does not entitle petitioner to any relief. In *INS* v. *Lopez-Mendoza*, 468 U.S. 1032, 1040 (1984), this Court recognized that a defect in the seizure of property subject to forfeiture does not justify dismissal of forfeiture proceedings. In keeping with that principle, *South Livonia* itself refused to reverse a forfeiture on the basis of its determination that the real property in question should not have been seized without a prior hearing. Citing several cases, the Second Circuit explained that "the illegal seizure of property, standing alone, will not immunize that property from forfeiture, so long as impermissibly obtained evidence is not used in the forfeiture proceeding." 889 F.2d at 1265. The court of appeals applied the same reasoning here, finding that the evidence of record at this juncture "suffice[s] to establish" probable cause. 91-781 Pet. App. 5a. It is unnecessary—and would thus be inappropriate—to consider in this case whether the Constitution requires

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ment of Law Enforcement v. *Real Property*, Nos. 77,308-77,312 (Aug. 15, 1991). See also *United States* v. *141st Street Corp.*, 911 F.2d 870 (2d Cir. 1990) (authorizing seizure for forfeiture of an apartment building pursuant to an *ex parte* warrant based upon probable cause and distinguishing *South Livonia*), cert. denied, 111 S. Ct. 1017 (1991); *United States* v. *14128 South School Street*, 774 F. Supp. 475, 479 (N.D. Ill. 1991) (collecting decisions by federal district courts).

notice and a hearing before real property purchased with drug proceeds is seized for forfeiture.[13]

CONCLUSION

The cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

STEPHEN L. NIGHTINGALE
Assistant to the Solicitor General

JANUARY 1992

[13] Petitioner also contends that the verified complaint in this action was insufficient to establish probable cause. Pet. 20-23. That question was not among the issues certified for interlocutory appeal, see 91-781 Pet. App. 4a; the court of appeals did not consider it; and it is moot in view of the lower court's concurrent finding that the present record establishes probable cause.

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No. 91-1052

In The

Supreme Court of the United States

October Term, 1991

BETH ANN GOODWIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Cross-Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY TO THE OPPOSITION BRIEF FOR THE UNITED STATES

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REASONS FOR GRANTING THE CROSS-PETITION FOR CERTIORARI

1. This Court Should Grant Review of the Question Whether Our Government Can Compel a Person's Testimony Under Immunity and Then Use That Testimony In a Quasi-Criminal Proceeding to Forfeit The Person's Home.

The government attempts to persuade this Court not to review this issue by asserting that the Brenna indictment was obtained independent of Goodwin's testimony, asserting:

> There is no dispute the petitioner's testimony provided no information regarding Brenna's drug transaction.

(Govt. Br. in Opp. at 9) That is absolutely erroneous. The actions of the prosecutors provide irrefutable evidence of the value and usefulness of petitioner's immunized testimony to pursue and prove this indictment. Indeed, immediately after the return of the indictment, the government prosecutor demanded that petitioner be available as a "material witness" for the prosecution and again promised Ms. Goodwin immunity. (See Exhibits A and B attached hereto.)[1] It is therefore clear that petitioner's immunized testimony was sufficiently important to the government so that it intended to reproduce that testimony firsthand at the trial. (See Exhibits A and B attached hereto.)

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[1] For the convenience of the Court, we have reproduced the pertinent correspondence from the government's counsel as Exhibits A and B to this Reply Memorandum.

Contrary to the government's assertions, there was no record from which any factual determination could have been made that the indictment of Brenna was independently obtained. The indictment was returned in early April in the district of Florida within a month of the district court's decision on the motions below. That indictment was filed with the district court by the government to serve as basis for the government's motion to stay the proceedings pursuant to 21 U.S.C. 881(i) (33a-34a).[2] No factual affidavits nor even a proffer was made by the government at any time thereafter to suggest that the indictment was obtained independent of Goodwin's testimony. No hearing occurred at which the government sought to establish that the indictment was independently obtained.

The government suggests that petitioner is required to demonstrate that her testimony was used to secure or further the criminal investigation that produced the indictment. (Govt. Br. in Opp. at 8-9) But this turns the *Kastigar* doctrine on its head. Petitioner was not privy to the precise evidence utilized. In fact, the Federal Criminal Rules (*i.e.*, Fed. R. Crim. P. 6) preclude her from learning what evidence the government used to obtain the indictment. It is therefore the government's burden to prove that the indictment was not procured on the basis of immunized testimony or the fruits thereof; not the other

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[2] The Appendix to the government's petition will be referenced as (App. [pages]). The Appendix of Cross-Petitioner Goodwin will be referenced as (C.P. App., *infra*, [pages]).

way around. *See United States v. Kastigar,* 406 U.S. 441 (1972)[3] and the cases cited at p. 5 *infra.*

Neither the district court nor the Third Circuit have found as a fact that the indictment was obtained independent of petitioner's testimony or the fruits thereof. The district court *sua sponte* reasoned that Ms. Goodwin's immunized testimony did not admit complicity in, or direct knowledge of, a drug offense and therefore the indictment should be considered independent thereof. But the district court's analysis cannot be reconciled with the importance of petitioner's testimony to the government as demonstrated by Exhibits A and B. The indictment was returned a full year after the seizure and more than a year and a half after petitioner's testimony. Her immunized testimony exceeded 100 transcript pages. The testimony reviewed her knowledge of the relationship between Joseph Brenna and other co-defendants. It explored Ms. Goodwin's knowledge of the relations between potential defendants, witnesses, their boat businesses, and hotel businesses in the Caribbean. The questioning explored Brenna's trips out of the country and elsewhere and the ownership of boats, some of which the government now claims were involved in drug transactions after 1985. All of this could be relevant to the

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[3] The government also claims that the only contention that furthered the prosecution in the more than 100 pages of immunized testimony was petitioner's admission that she received money from Brenna. This testimony was voluminous and contained many facts. Surely petitioner cannot determine which portions of her immunized testimony were useful to secure the indictment and prosecute Brenna and which portions the government intended to use at trial.

indictment. Indeed, the government representative who took the testimony and used it to draft the forfeiture Complaint stated that he provided the immunized statement to the prosecuting authorities in Florida. (App. 10a; C.P. App. 24a)

The fact that an indictment of Brenna was returned a year after the seizure is legally irrelevant to the issue presented even if the indictment was independently obtained. That subsequent event is not an independent justification for the seizure a year prior thereto. The use of immunized testimony to draft the Complaint to forfeit the home cannot be cleansed a year later by the return of an indictment. Simply put, the quasi-criminal forfeiture Complaint was prepared with tainted evidence and should be dismissed.[4]

If a criminal indictment containing a forfeiture provision was procured by utilizing immunized testimony of the defendant, six out of seven circuits would require the dismissal of the pleading. If a quasi-criminal forfeiture Complaint against an innocent owner is based on such immunized testimony, it follows *a fortiori* that such an innocent owner should receive the same benefit and obtain a dismissal of that pleading.

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[4] If petitioner had been charged in an indictment in Florida and her interest in the house sought to be forfeited was based upon her immunized testimony, she would have moved to have the indictment and criminal forfeiture dismissed and that motion would in all likelihood have been granted. See authorities at p. 5, *infra*. Her motion, denied by the district court below, to dismiss the quasi-criminal forfeiture complaint on the same ground should have been granted.

If an indictment is gained with immunized testimony, the government should not be permitted to cleanse that indictment after the fact by claiming that later procured evidence was independently obtained and would have warranted the same criminal indictment. Six circuits have held that an indictment obtained with such testimony should be dismissed. *See United States v. North*, 920 F.2d 940, 948 (D.C. Cir. 1990), *cert. denied*, 111 S.Ct. 2235 (1991); *United States v. Hampton*, 775 F.2d 1479, 1491 (11th Cir. 1985); *United States v. Hinton*, 543 F.2d 1002, 1010 (2d Cir. 1976), *cert. denied*, 429 U.S. 980 (1976); *United States v. Garrett*, 797 F.2d 656 (8th Cir. 1986); *United States v. Zielezinski*, 740 F.2d 727, 732 (9th Cir. 1984); *United States v. Beery*, 678 F.2d 856 (10th Cir. 1982). Only the Fourth Circuit permits an indictment obtained in part through the use of immunized testimony to survive a dismissal motion. *See United States v. Society of Independent Gasoline Marketers of America*, 624 F.2d 461, 473-74 (4th Cir. 1979), *cert. denied*, 449 U.S. 1078 (1981).

If a criminal defendant is entitled to such protection, this Court should likewise make it clear that similar protection is offered to an innocent homeowner defending her house from forfeiture in a quasi-criminal action. The government provides no authority to suggest that this issue is unworthy of review to resolve these differences in the circuits as to the appropriate remedy when testimony is compelled and then used directly in criminal and quasi-criminal cases against the immunized citizens.[5] If, as the cases demonstrate, the government intends to

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[5] The other related conflicting holdings cited in our cross-petition at p. 10 were not addressed by the government but also compel review of the issue.

pursue its criminal forfeiture program with such vigor, this Court should provide guidance to resolve the conflict among the Circuits as to what use may be made of immunized testimony to pursue such forfeitures, whether the forfeitures are criminal or quasi-criminal.

2. This Court Should Correct The Ruling Below And Hold That an Innocent Homeowner Has the Benefit of The Protection of The Statute of Limitations For Quasi-Criminal Forfeiture Actions Similar to That Available to a Criminal Defendant.

The government concedes that there are no known decisions construing the appropriate statute of limitations for actions brought pursuant to 21 U.S.C. 881(a) except the decision below. Moreover, the government proffers no justification for the anomaly that now exists where Brenna, the alleged criminal, is protected by a five-year statute of limitations for a criminal forfeiture of his alleged interest in this same house and the government contends that the actual innocent owner, Goodwin, could be subject to a forfeiture for a substantially longer period of time.

This anomaly can be resolved by a common sense interpretation of the actual wording of 21 U.S.C. 881 which does not by its specific terms incorporate the expensive customs statute of limitations but rather leaves this forfeiture action subject to the five-year specific statute of limitations applicable to all federal forfeitures, *i.e.*, 28 U.S.C. 2462.

In order to persuade this court not to accept this issue for review, the government argues that 28 U.S.C. 2462 would be tolled during the time period that the

government did not know of the alleged basis for the forfeiture, and therefore, there is no difference in the application of these statutes. (Govt. Br. in Opp. at 11 n.8) However, no reported decision has so held. In fact, all reported decisions reflect that there is no such tolling of 28 U.S.C. 2462. *See, e.g., United States v. One Dark Bay Horse,* 130 F. 240 (D.C.Vt. 1904); *Lancashire Shipping Co. v. Durning,* 98 F.2d 751 (2d Cir. 1938), *cert. denied,* 305 U.S. 635 (1938). The only authority cited as support for the government's contention that 28 U.S.C. 2462 would be tolled when the government is unaware of its forfeiture action is a statement in a legal treatise referring to the general rule for the accrual of federal civil causes of action. (Govt. Br. in Opp. at 11 n.8). That statement in the treatise is inapposite and based solely on the application of cases and statutes which are not forfeiture cases and statutes.

Moreover, 28 U.S.C. 2462 contains no provision by which it is tolled. In contrast, 19 U.S.C. 1621 contains just such a tolling provision by its explicit terms. Since the government's interpretation as to tolling of 28 U.S.C. 2462 conflicts both with the wording of the statute and the reported decisions, it should be rejected. This Court should grant review of this issue to correct a grossly erroneous decision regarding forfeiture that will doubtless be cited by the government in other forfeiture proceedings.

3. This Court Should Grant Review of The Question Whether Due Process Permits The Seizure of an Innocent Persons' Home After Years of Undue Delay.

The government argues (Govt. Br. in Opp. at 12) that the Due Process Clause does not apply to any delay in a

forfeiture proceeding which occurs before the formal seizure. Thus, the government contends that a homeowner like petitioner Goodwin will be forever subject to having her home seized without limitation by the Due Process Clause so long as the seizure is promptly followed by a forfeiture action. If the government had not come into the possession of evidence indicating that Brenna's funds were allegedly traceable to drug activity until the year 2020, Ms. Goodwin, according to the government, still would have no protection by virtue of the Due Process Clause or the statute of limitations. According to the government, neither the Due Process Clause of our Constitution nor the statute of limitations will protect her from any such delay despite her conceded innocence of any relevant criminal activity. We submit that the Due Process Clause cannot countenance such a result.

4. This Court Should Consider Whether Our Constitutional Prohibition Against Unreasonable Seizures Requires a Hearing Before a Home is Seized and What Standards are Applicable Thereto.

The government concedes there is a two-to-one split in authority among the circuits as to whether the Fourth Amendment to our Constitution requires an evidentiary hearing before a home is seized in a forfeiture action, and if so, the nature of such hearing. (Govt. Br. in Opp. at 14) That split warrants resolution by this Court.

This question was the first issue certified by the district court. (App. 44a-45a) The district court considered that issue in this context and determined that the facts in opposition to the summary judgment motion were adequate to discharge the government's burden.

(App. 18a to 25a, particularly beginning at 20a) The fact that the source of the funds for the purchase was cash, which the claimant contends may have come from Brenna's boat business, is not an adequate basis for the seizure alone. The only other basis for the seizure is the alleged double hearsay report from an unreliable informant (Mazocca). The deposition of DEA agent Giacobbe, punctuated by scores of government instructions not to answer, concluded with the revelation that neither the agent, Murphy, nor Mazocca had any basis for believing and did not know whether the funds traceable to the house purchase came from any illegal transaction. (*e.g.*, C.P. App. at 31a-36a)

The government urges this Court not to consider this issue on the grounds it was not specifically certified; however, the district court certified the question whether a pre-seizure hearing is constitutionally mandated and considered, within that context, what the standard and evidence to fulfill the government's obligation would be. The Second Circuit in *United States v. Premises and Real Property at 4492 Livonia Rd.*, 889 F.2d 1258, 1262-1266 (2d Cir. 1989) did the same when it concluded that the Constitution mandated a pre-seizure hearing.

Once again the government seeks to persuade this Court to ignore the issue by arguing that the indictment returned a full year after the seizure somehow ratifies the improper seizure. For the reasons set forth above at pp. 1-4, *supra*, that claim should be rejected. Moreover, the indictment contains no facts or specific allegations that Brenna received any money prior to 1985 from any alleged drug transactions.

In this case, if the defendant had a pre-seizure hearing, the lack of probable cause would have been evident. The government never produced any reliable evidence in this case other than the fact that Brenna had provided cash in 1982 to Murphy, who later transferred some money traceable thereto to Goodwin. Since there was ample evidence known to the government that Brenna had an off-shore boat business, the mere fact that he had liquid assets should not justify such a forfeiture.

The government continues to seize homes throughout the country without providing pre-seizure hearings. This practice warrants a resolution of the issue of whether our Constitution sanctions such a practice and what showing should be made at that hearing, if it is required.

We ask this Court, as the district court similarly requested by its certification, to resolve the issue of whether a citizen's home may be seized only after an evidentiary hearing, and, if so, what is the proper standard the government must meet.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari with respect to the four questions presented in the cross-petition.

Respectfully submitted,

WALDER, SONDAK, BERKELEY & BROGAN, P.A.
Attorneys for Petitioner, Beth Ann Goodwin

JAMES A. PLAISTED
Counsel of Record

EXHIBIT A

UNITED STATES DEPARTMENT OF JUSTICE

[SEAL]
IN REPLY
PLEASE
REFER TO
INITIALS AND
NUMBER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA
299 EAST BROWARD BOULEVARD
FT. LAUDERDALE, FLORIDA 33301
Suite #309E
(305) 527-7392

April 13, 1990

Mr. James Plaisted
5 Becker Farm Road
Roseland, New Jersey 07068

Re: Beth Ann Goodwin

Dear Mr. Plaisted:

Please be advised that Beth Ann Goodwin is a material witness on behalf of the United States government in the case of United States v. Maiorino, *et al.*, Case No. 90-6055-CR-GONZALEZ. No date for trial has been set at the present time. Please contact the undersigned government counsel to discuss Ms. Goodwin's availability.

Thank you for your anticipated cooperation.

Very truly yours,

DEXTER W. LEHTINEN
UNITED STATES ATTORNEY

BY: /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
Assistant United States Attorney

EXHIBIT B

UNITED STATES DEPARTMENT OF JUSTICE

[SEAL]
IN REPLY
PLEASE
REFER TO
INITIALS AND
NUMBER

UNITED STATES ATTORNEY
SOUTHERN DISTRICT OF FLORIDA
299 EAST BROWARD BOULEVARD
FT. LAUDERDALE, FLORIDA 33301
Suite #309E
(305) 527-7392
April 19, 1990

Mr. James Plaisted
5 Becker Farm Road
Roseland, New Jersey 07068

Re: Beth Ann Shurack

Dear Mr. Plaisted:

Pursuant to our telephone conversation of April 17, 1990, please be advised that your client, Beth Ann Shurack/Goodwin has been granted immunity, pursuant to Title 18, United States Code, Sections 6002-6003. Accordingly, no testimony or other information resulting from Ms. Goodwin's deposition on May 5, 1988 (or any information directly or indirectly derived from such testimony or other information) may be used against her in any criminal case, except a prosecution for perjury, or for giving a false statement.

Please be further advised that the United States considers Ms. Goodwin to be a material witness in the case of *United States v. Joseph C. Maiorino, et al.*, and therefore I would request that she be made available for trial preparation.

Thank you for you [sic] anticipated assistance in this matter.

Very truly yours,
DEXTER W. LEHTINEN
UNITED STATES ATTORNEY
BY: /s/ Paul F. Schwartz
PAUL F. SCHWARTZ
Assistant United States Attorney